
United States
Circuit Court of Appeals
For the Ninth Circuit.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Appellant,

vs.

THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

FILED

MAR 29 1930

PAUL P. O'BRIEN,
CLERK

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Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant :

LOUIS FERRARI, Esq.,

J. J. POSNER, Esq.,

San Francisco, California;

F. W. HENDERSON, Esq.,

Merced, California.

For Appellee :

HARTLEY F. PEART, Esq.,

111 Sutter Street, San Francisco, California;

GALLAHER & JERTBERG, Esqs.,

Fresno, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

BANK OF ITALY NATIONAL)
TRUST AND SAVINGS ASSO-)
CIATION, a national banking asso-)
ciation,)

Plaintiff,)

vs.)

No. 357-J. Civil.
CITATION ON
APPEAL.

THE FARMERS AND MER-)
CHANTS NATIONAL BANK OF)
MERCED, a national banking asso-)
ciation, and HENRY P. HILLI-)
ARD, as Receiver thereof,)

Defendants.)

United States of America,)

) ss.

Southern District of California.)

To THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof, Defendants above named, and to HARTLEY F. PEART and GALLAHER & JERTBERG, their Attorneys, GREETINGS:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the CITY OF SAN FRANCISCO, in the State of California, on the 8th day of March, 1930, pursuant to an Appeal filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain

action numbered 357-J Civil, wherein BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, is appellant, and you are respondents to show cause, if any there be, why the judgment given, made and entered against the said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, a national banking association, and HENRY P. HILLIARD, as Receiver thereof, in the said Appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Paul J. McCormick United States District Judge for the Southern District of California, this 7th day of February, A. D. 1930 and of the Independence of the United States, the One Hundred and fifty-fourth.

Paul J. McCormick
United States District Judge for the Southern
District of California

Service of the within citation on appeal and receipt of copy admitted February 10th 1930

Hartley F. Peart
Gallaher & Jertberg,
Attorneys for Defendants and Appellees.

Receipt of copy of Bond on Appeal, copy of Assignment of Errors, copy of Petition on Appeal and Stipulation and order re printing of Transcript admitted February 10th, 1930.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for defendants and appellees.

[Endorsed]: Filed Feb. 12, 1930. R. S. Zimmerman
Clerk By M. L. Gaines Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, IN AND FOR THE
COUNTY OF MERCED.

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BANK OF ITALY NATIONAL
TRUST AND SAVINGS ASSO- :
CIATION, a national banking asso- :
ciation,

Plaintiff, :

vs.

No. 7178.

: COMPLAINT.

THE FARMERS AND MER-
CHANTS NATIONAL BANK OF
MERCED, a national banking asso- :
ciation, and HENRY P. HILLI-
ARD, as Receiver thereof,

:

Defendants.

-----c0o-----

For cause of action against defendants plaintiff alleges:

I.

That plaintiff is now, and ever since March 1, 1927 has been a national banking association duly organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City and County of San Francisco, State of California, and with a branch place of business in the City of Merced, County of Merced, State of California.

II.

That Merced Security Savings Bank is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Merced, County of Merced, State of California.

III.

That defendant The Farmers and Merchants National Bank of Merced is now and was at all times herein mentioned a national banking association duly organized and existing under and by virtue of the laws of the United States of America, with its principal place of business in the City of Merced, County of Merced, State of California; that said defendant bank is now and has been since on or about September 20, 1926 in liquidation; that on or about October 1, 1926 defendant Henry P. Hilliard was by the Comptroller of the Currency of the United States of America duly appointed receiver of said The Farmers and Merchants National Bank of Merced; that he thereupon duly qualified and has ever since been and now is the duly appointed, qualified and acting receiver of said bank.

IV.

That on or about the 31st day of December, 1925 said Merced Security Savings Bank was the owner of, in possession of, and entitled to the possession of certain negotiable bonds hereinafter mentioned and described; that at all times in this paragraph 4 mentioned one J. B. Hart was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, and at all of said times said J. B. Hart was also the president and manager of said The Farmers and Merchants National Bank of Merced; that on or about said 31st day of December, 1925 in accordance with and pursuant to that certain statute of the State of California entitled, "An Act to Authorize and Control the Deposit in Banks of Money Belonging to or in the Custody of any County or Municipality within this State, and to Repeal all Acts or

Parts of Acts in Conflict with this Act," approved April 12, 1923, and known and designated as Chapter 17 of the Statutes of California of 1923, pages 25 to 29 inclusive, said Merced Security Savings Bank deposited with said J. B. Hart as Treasurer of said City of Merced said negotiable bonds as security for a certain deposit of \$25,000.00 of public moneys belonging to said City of Merced then in the custody and control of said J. B. Hart as such Treasurer, and thereupon said Merced Security Savings Bank received from said J. B. Hart as such Treasurer the said amount of \$25,000.00 of public moneys as such deposit.

That at some time or times between December 31, 1925 and September 20, 1926 and without the consent or knowledge of said Merced Security Savings Bank and without the consent or knowledge of said City of Merced, the said J. B. Hart delivered the possession of said negotiable bonds to said The Farmers and Merchants National Bank of Merced; that on or about the 13th day of May, 1926 said The Farmers and Merchants National Bank of Merced sold and converted the said negotiable bonds to its own use and benefit without the knowledge or consent of said Merced Security Savings Bank or of said City of Merced and appropriated the proceeds thereof to its own use and to the damage of said Merced Security Savings Bank in the sum of \$28,000.00; that said sale and conversion of said negotiable bonds as aforesaid was not made in connection with said deposit of public moneys and was not dependent upon or connected therewith in any way whatever; that said sale so made as aforesaid was made by said The Farmers and Merchants National Bank of Merced to a holder in due course.

V.

That following is a description of the bonds hereinbefore mentioned:

<u>Number</u>	<u>Description</u>	<u>Face Value</u>
27-28	Santa Monica Storm Drainage Bonds	\$1000.00
22-27-28-29	Santa Monica Fire Apparatus Bonds	2000.
27-28-29-30	Santa Monica Bridge Imp. Bonds	2000.
27-28-29-30	Santa Monica Sewer Bonds	4000.
	37 Turlock Irrigation District Bonds of \$400. each	14800.
	268-269-270-271-272-274-277-280-1020-1021-1022-1023-2058-2057-2059-2279-2280-2281-2282-2283-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513 and 2514	
8625	City of Los Angeles Electric P.	1000.
796-781 and 751	City of Los Angeles Water Works Bonds at \$1000.	3000.

VI.

That at all times in this complaint mentioned said negotiable bonds were and now are of the market value of \$28,000.

VII.

That said Merced Security Savings Bank did not discover and had no knowledge of said conversion or of said sale of said bonds until subsequent to the 20th day of Sep-

tember, 1926 at which time said The Farmers and Merchants National Bank of Merced went into liquidation.

VIII.

That subsequent to said 20th day of September, 1926 and prior to February 21, 1927, said Merced Security Savings Bank made proof of its claim herein arising out of the facts hereinbefore alleged for damages in the sum of \$28,000. for the said conversion of said bonds, which said proof of claim was in writing and duly verified by the Cashier of said Merced Security Savings Bank, and presented said claim to said defendants and each of them for allowance; that on or about the 21st day of February, 1927 the said defendants and each of them rejected said claim and have and each of them has refused ever since said time and at the present time to allow the said claim or any part thereof or to pay anything thereon; that no part thereof has been paid.

IX.

That prior to the commencement of this action Merced Security Savings Bank transferred and assigned to plaintiff all of its right, title and interest in and to said bonds and to the claim, demand and cause of action herein arising out of the said conversion of said bonds as aforesaid, and plaintiff is now the owner and holder of said claim, demand, cause of action and all rights against said defendants and each of them arising out of said conversion so as aforesaid and the said rejection of said claim as aforesaid.

X.

That prior to the commencement of this action said deposit of \$25000. so made as aforesaid with all interest due thereon was fully paid and delivered to said City of Merced.

WHEREFORE, plaintiff prays that this court by its judgment establish said claim for conversion of said bonds as a valid claim against said defendants and direct said Receiver to certify the same as a valid claim against defendants to Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of said bank, together with interest on said \$28,000.00 at the rate of seven per cent. per annum from date of conversion, and for its costs of suit herein and for such other and further relief as may seem meet in the premises.

J. J. Posner
Louis D'enari and
F. W. Henderson
Attorneys for plaintiff.

STATE OF CALIFORNIA. :
CITY AND COUNTY OF : ss.
SAN FRANCISCO. :

A. PEDRINI, being first duly sworn, deposes and says: That he is Vice President of the plaintiff corporation named in the above entitled action and as such makes this affidavit for and on behalf of said corporation; that he has read the within and foregoing complaint and knows the contents thereof; that the *said* is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters that he believes it to be true.

A. PEDRINI

Subscribed and sworn to before me this 12th day of September, 1927

[Seal]

Virginia A. Beedi

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed this 14 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[TITLE OF COURT AND CAUSE.]

No. 7178

PETITION FOR REMOVAL

TO THE HONORABLE SUPERIOR COURT OF
THE STATE OF CALIFORNIA, IN AND FOR
THE COUNTY OF MERCED:

Your petitioner, one of the defendants above named, Henry P. Hilliard, Receiver of The Farmers and Merchants National Bank of Merced, a corporation, on his own behalf, as Receiver of said bank and on behalf of the other defendant, the said The Farmers and Merchants National Bank of Merced, a corporation, respectfully shows to this honorable Court:

That the above entitled action was heretofore brought by the above named Plaintiff in the above entitled action; that summons was issued herein and was served with a copy of the complaint filed herein upon the defendant, The Farmers and Merchants National Bank of Merced, a corporation, on the 16th day of September, 1927, in the County of Merced, State of California, by serving said papers upon one W. E. Landram, a former vice president of said bank; that your petitioner as Receiver of said bank, although summons has been issued, has not been served with summons or copy of the complaint, and that the time has not elapsed within which your petitioner or said bank is allowed, under the practice and laws of the State of California to plead, demur, answer, or otherwise move in said action.

That The Farmers and Merchants National Bank of Merced is, and at all times in said complaint mentioned has been, a banking corporation, duly organized and ex-

isting under and by virtue of the laws of the United States of America, and having its banking house and principal place of business in the City of Merced, County of Merced, State of California; that said bank prior to the 23rd day of September, 1926, became and was insolvent, and ever since said date has been and now is, insolvent.

That on the 23rd day of September, 1926, your petitioner herein, Henry P. Hilliard, was by the Comptroller of the Currency of the United States of America, duly and regularly appointed Receiver of said bank and duly qualified and entered upon the duties of said receivership of said bank, and ever since has been and now is the duly appointed, qualified and acting Receiver of said Bank.

Your petitioner further shows that the above entitled action is of a civil nature, and was brought by said plaintiff to establish an alleged claim for the alleged conversion by said bank of certain bonds alleged to be of the value of \$28,000 as a valid claim against said defendants and to direct your petitioner to certify the same as a valid claim against the defendants to the Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of said bank, together with interest on said \$28,000 at the rate of 7% per annum from the date of the alleged conversion; that your petitioner and said bank deny said claim and dispute the same, and that the matter in dispute in said action exceeds the sum of \$3,000, exclusive of interest and costs; that your petitioner offers and files herein his bond with good and sufficient security as required by the Act of Congress, that he will enter in the District Court of the United States in and for the Southern District of California, Northern Division, within thirty (30) days from the filing of this peti-

tion for removal, a certified copy of the record in said action, and for the payment of all costs that may be awarded by said District Court if such District Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioner further prays that this petition and said bond may be accepted by this court and that said suit may be removed into the District Court of the United States in and for the Southern District of California, Northern Division, pursuant to the aforesaid statute in such case made and provided, and that a transcript of the record herein be directed to be made up as provided by law, and that no further proceedings be had herein in this court, and for such other and further relief as may be proper

HENRY P. HILLIARD

Petitioner.

HARTLEY F. PEART

GALLAHER & JERTBERG

Attorneys for Petitioner.

STATE OF CALIFORNIA)
COUNTY OF MERCED) SS.

HENRY P. HILLIARD, being first duly sworn, deposes and says: That he is the Receiver of The Farmers and Merchants National Bank, a corporation, and petitioner in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to those matters that he believes it to be true.

HENRY P. HILLIARD

Subscribed and sworn to before me this 17th day of September 1927.

[Seal]

H. S. SHAFFER

Notary Public in and for said County and State.

[Endorsed]: Filed this 26 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[TITLE OF COURT AND CAUSE.]

No. 7178

ORDER FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT.

It appearing that the defendant HENRY P. HILLIARD, Receiver of The Farmers and Merchants National Bank of Merced, a corporation, in the above entitled action has filed his petition for the removal of this cause to the United States District Court in and for the Southern District of California, Northern Division, in accordance with the law therefor provided, and said Defendant having filed his bond duly conditioned, with good and sufficient surety as provided by law, and it appearing to the court that this is a proper case for removal to said District Court,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that said petition and bond be and the same are hereby accepted and approved, and that this cause be, and it is hereby removed to the United States District Court in and for the Southern District of California, Northern Division thereof; and the Clerk is hereby directed to make a copy of the record in said cause duly certified for trans-

mission to said District Court forthwith, and that no further proceedings be taken in this court.

DONE in Open Court this 26th day of September, 1927.

L. W. FULKERTH

Judge of said Superior Court.

[Endorsed]: Filed this 26 day of Sept. 1927. P. J. Thornton, County Clerk, by Neta M. Porter, Deputy.

[Endorsed]: Case No. 357. Filed Oct. 25, 1927. R. S. Zimmerman, R. S. Zimmerman, Clerk.

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[TITLE OF COURT AND CAUSE.]

No. 357-J. CIVIL

ANSWER

Come now the defendants and for answer to the complaint of the plaintiff herein admit, deny and allege:

I.

The defendants deny that on or about the 31st day of December, 1925, the Merced Security Savings Bank deposited with J. B. Hart as Treasurer of the City of Merced, the bonds described in paragraph 5 of plaintiff's complaint herein, and in this connection defendants allege that they are informed and believe, and upon such information and belief allege the fact to be that on or about said 31st day of December, 1925, the said Merced Security Savings Bank deposited with the said J. B. Hart as Treasurer of said City of Merced certain Municipal bonds, the par value of which said bonds was the sum of \$28,000.00.

Defendants deny that at sometime between December 31, 1925 and September 20, 1926, or at any other time

the said J. B. Hart delivered the possession of said negotiable bonds to The Farmers and Merchants National Bank of Merced, and deny that on or about the 13th day of May, 1926, or at any other time, The Farmers and Merchants National Bank of Merced sold the said negotiable bonds or converted said negotiable bonds to its own use and benefit or to its own use or benefit, or at all, and deny that the said Merced Security Savings Bank was damaged in the sum of \$28,000.00, or in any sum whatsoever; and deny that said sale was made, or any sale made in any manner of said or any bonds by The Farmers and Merchants National Bank of Merced.

Defendants allege that they have not sufficient information or belief upon the subject to enable them to answer that portion of paragraph 4 of the plaintiff's complaint herein which alleges that "said sale so made as aforesaid was made by said The Farmers and Merchants National Bank of Merced to a holder in due course," and placing their denial upon that ground deny that said or any sale was made by said The Farmers and Merchants National Bank, and placing their denial upon that ground deny that any sale of said bonds was made to a holder in due course, and defendants are informed and believe, and upon such information and belief allege the fact to be, that bonds in the possession of the said J. B. Hart as Treasurer of the said City of Merced and being then and there the property of the said Merced Security Savings Bank, were transferred by said J. B. Hart to a holder, but defendants are informed and believe, and upon such information and belief allege the fact to be, that said transfer was not a sale thereof and was not to a holder in due course.

II.

Answering paragraph 5 of the plaintiff's complaint herein, defendants deny that the bonds described in said paragraph 5 of said complaint are or were the same bonds delivered by the said Merced Security Savings Bank to the said J. B. Hart as Treasurer of the City of Merced on or about the 31st day of December, 1925, and in this connection defendants are informed and believe, and upon such information and belief allege the fact to be that said bonds delivered by said Merced Security Savings Bank to said J. B. Hart as Treasurer of the City of Merced on or about the 31st day of December, 1925, were by said J. B. Hart thereafter and prior to the 12th day of May, 1926, transferred to the possession of another, and that on or about the 12th day of May, 1926, the said J. B. Hart as Treasurer of the said City of Merced recovered the possession of said bonds and re-delivered said bonds to the said Merced Security Savings Bank.

III.

Answering paragraph 9 of plaintiff's complaint herein, defendants allege that they have not sufficient information or belief upon the subject to answer the allegations of said paragraph 9 of said complaint, and placing their denial upon that ground deny that prior to the commencement of this action, or at all, Merced Security Savings Bank transferred and assigned to plaintiff herein all of its rights, title and interest in and to said bonds and to the claim, demand and cause of action herein arising out of the said conversion of said bonds as aforesaid, and upon the same ground deny that the said Merced Security Savings Bank at any time transferred or assigned to plaintiff all of its rights, or any of its rights, or all of its title,

or any of its title, or all of its interest, or any of its interest in and to, or in or to, said bonds, or to any claim or demand or cause of action arising out of any conversion of said bonds, and placing their denial upon the same ground defendants deny that the plaintiff is now the owner and holder of said claim, demand, cause of action, and all rights against said defendants and each of them arising out of said conversion, or arising out of any conversion, and deny that the plaintiff is now the owner or the holder of said or any claim against the defendants, or against either of them, and deny that the plaintiff is the owner or holder of any cause of action, or any right or rights against said defendants or against either of them.

IV.

Answering paragraph 10 of plaintiff's complaint herein, defendants have not sufficient information or belief upon the subject to enable them to answer the allegation in said paragraph 10 of said complaint, and placing their denial upon that ground deny that prior to the commencement of this action, or at all, said deposit of \$25,000.00 or any other amount, was paid and delivered to said City of Merced, or paid or delivered to said City of Merced, and in this connection defendants allege that they are informed and believe, and upon such information and belief allege the fact to be, that prior to the commencement of the above entitled action the said Merced Security Savings Bank and the plaintiff herein settled and adjusted any and all claims arising out of the transaction concerning said bonds mentioned in the complaint herein with the sureties of the said J. B. Hart as City Treasurer of the City of Merced, and defendants are informed and believe, and upon such information and belief allege the fact to be, that a surety

company, the name of which is unknown to the defendants herein, fully paid and discharged all of the obligations of the said J. B. Hart as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to the said Merced Security Savings Bank and to the plaintiff herein, and that the said Merced Security and Savings Bank and the said plaintiff herein then, at the time of said settlement and prior to the commencement of this action, received from the said surety company, whose name is unknown to these defendants, full pay and compensation for any and all losses sustained by them, or by either of them, by reason of any and all transactions of the said J. B. Hart as Treasurer of the said City of Merced, or in any manner whatsoever in connection with any and all of the bonds mentioned in the complaint herein and received by the said J. B. Hart as Treasurer of the City of Merced as security for deposits made of moneys belonging to the said City of Merced in the said Merced Security Savings Bank.

Hartley F. Peart

Gallaher & Jertberg

Attorneys for Defendants.

STATE OF CALIFORNIA)
 City and) SS.
 COUNTY OF San Francisco.)

HENRY P. HILLIARD, as Receiver of The Farmers and Merchants National Bank of Merced, being first duly sworn, deposes and says: My name is Henry P. Hilliard; I am the Receiver of The Farmers and Merchants National Bank of Merced, and one of the defendants in the above entitled action; I have read the foregoing Answer

and know the contents thereof and the same is true of my own knowledge except as to the matters which are therein stated on information or belief and as to those matters I believe it to be true.

Henry P. Hilliard

Subscribed and sworn to before me this 12th day of November 1927.

[Seal]

W. W. Healey

NOTARY PUBLIC in and for the County of SAN FRANCISCO, State of California.

Due and legal service of the within Answer and receipt of a copy thereof is hereby admitted this 14th day of November 1927.

Louis Ferrari and

F. W. Henderson

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 14, 1927 R. S. Zimmerman, Clerk, By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

STIPULATION WAIVING JURY.

IT IS HEREBY STIPULATED that a jury be and the same is hereby waived in the above entitled action and that the said case shall be tried by said Court without a jury.

IT IS UNDERSTOOD that this stipulation waiving a jury is not intended as a waiver of either of the parties

hereto with reference to their rights involved in the matter of the motion to remand said case for trial to the Superior Court of the County of Merced, State of California.

Dated, October 24, 1928.

Louis Ferrari and
F. W. Henderson,
Attorneys for Plaintiff.
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

[Endorsed]: Filed October 24, 1928. R. S. Zimmerman, Clerk By Louis J. Somers, Deputy.

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

MOTION FOR JUDGMENT.

Now comes plaintiff in the above entitled matter and moves the Court that judgment in said action be entered in favor of plaintiff and against defendants for the sum of \$28,000. and for its costs of suit herein, and that said Court adjudge and decree that the claim of said plaintiff against defendants is a valid claim and direct that said Receiver certify the same as a valid claim against defendants to the Comptroller of Currency of the United States, to be paid by him in the due course of the liquidation of said Bank, together with its costs of suit herein incurred.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

STIPULATION.

IT IS HEREBY STIPULATED between the attorneys for the respective parties to the above entitled action that the foregoing motion be deemed to have been made by plaintiff in said action and that the said motion be considered by said Court as made therein and that if said motion be denied and judgment be rendered in favor of defendants and against plaintiff, that plaintiff have an exception to the judgment and decision of said Court.

Louis Ferrari

J. J. Posner

F. W. Henderson

Attorneys for Plaintiff.

Hartley F. Peart

Gallaher & Jertberg

Attorneys for Defendants.

It is so Ordered pursuant to foregoing stipulation.

Dated Feb. 18th, 1929,

Paul J. McCormick

Judge of said Court.

[Endorsed]: Filed Feb. 18, 1929. R. S. Zimmerman,
Clerk By M. L. Gaines, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CIVIL NO. 357-J

LOUIS FERRARI, Esq. and J. J. POSNER, Esq. of San Francisco, Calif., and F. W. HENDERSON, Esq., of Merced, Calif., attorneys for Plaintiff.

HARTLEY F. PEART, Esq., and Gallaher & Jertberg, of Fresno, Calif. for Defendants.

MEMORANDUM OF DECISION ON MERITS.

This is an action for conversion of personal property by plaintiff as assignee of Merced Security Savings Bank

(herein called Savings Bank) against Farmers and Merchants National Bank of Merced (herein called National Bank), and Henry P. Hilliard as Receiver thereof. The suit was originally filed in the State Court of California, but was removed here by the National Bank's Receiver.

The Savings Bank in order to obtain a deposit of \$25,000.00 of the funds of the city of Merced, a municipal corporation of California, from one J. B. Hart, the City Treasurer, deposited with Hart, as City Treasurer, certain of its negotiable municipal bonds of the value of approximately \$28,000.00. These securities were required by the laws of California to be deposited in order that the Savings Bank could receive the deposit of the city's funds (California Statutes, 1923, Pages 25-28. Upon delivery of the bonds to him, Hart, as Treasurer, deposited \$25,000.00 of the city's money in the Savings Bank. At the time of the deposit of the bonds of the Savings Bank, Hart was also President and active Manager of the National Bank and transacted the business of the two offices in the same premises, using the premises and facilities of the National Bank as a depositary of city monies and securities. The complaint alleges that between Dec. 31, 1925, the date of the deposit and placing of the securities of the Savings Bank with Hart, as City Treasurer, and September 20, 1926, Hart delivered the possession of said bonds to the National Bank, and that on May 13, 1926, the National Bank sold and converted said bonds of the Savings Bank or of the city of Merced and appropriated the proceeds thereof to its own use to the damage of the Savings Bank in the sum of \$28,000.00. Judgment is asked against defendants for that amount of money and interest from date of conversion. It is alleged that the

sale and conversion of said bonds was not made in connection with said deposit of public funds and was not dependent upon or connected therewith in any way whatever. This latter allegation is uncontroverted and stands in the record as admitted. The complaint further avers that the conversion was unknown to the Savings Bank or to its successor, plaintiff herein, and was not discovered until subsequent to November 20, 1926, at which time the National Bank went into liquidation and the defendant Receiver was named by the Comptroller. The customary allegations of demand and refusal to deliver together with the usual averment of presentation of claim to the Receiver and rejection thereof by him appear in the complaint as do also the ordinary allegations of assignment of the claim sued on to plaintiff herein. The misappropriation of the bonds placed with Hart to obtain the deposit of city money in the Savings Bank was an incident in a series of defalcations of Hart as City Treasurer of Merced that culminated in his suicide shortly after discovery of his irregularities.

The answer of defendants denies the allegations of conversion by the National Bank and generally denies all of the other essential allegations of the complaint including a denial that defendant National Bank at any time received, acquired title to, or converted any of said deposited bonds of the *Saving* Bank. It is claimed that Hart as agent of the National Bank never received or converted the bonds, but that his wrongdoing was personal or as City Treasurer and not imputable to the National Bank. The answer sets up a further defense that there has been a compromise, settlement, and discharge of the claim of plaintiff and its assignor by reason of the alleged conver-

sion of the bonds of the Savings Bank and that the claim of plaintiff and its assignor has been fully satisfied and paid by reason of certain transactions between the Surety on the official bond of Hart as City Treasurer, the City of Merced, a municipal corporation and the plaintiff.

It is unnecessary to review in detail the evidence. It is complicated and involved. It is sufficient to state that it establishes the right of the plaintiff to recover under the issues raised by the complaint and answer.

The correspondence of Hart as the National Bank President as well as the books and records of the National Bank and specifically the entries therein concerning the bonds alleged to have been converted, clearly show that Hart was the agent of defendant National Bank in dealing with the securities in suit and that the conversion of the bonds of the Savings Bank admittedly made by Hart is chargeable to the National Bank as his principal. These records represent that the National Bank was the owner of the securities. The city could not be held chargeable for Hart's keeping, management and disposal of the bonds under the applicable California statutes (Sec. 8 Cal. Stat. 1923, P-25) It is contended that the National Bank should not be held accountable for the conversion and loss of the securities of the Savings Bank because the evidence fails to show that the National Bank profited by the irregularities and dishonesty of Hart in converting these securities. I cannot agree with this contention. The record is clear that the assets of the National Bank were preserved and enhanced by its president's transactions concerning these bonds with the First National Bank in Fresno. The transactions were apparently regular and within the apparent lawful and customary duties of an officer of a National

Bank and inured to the benefit of the National Bank. See *Campbell vs. Mfg. Nat. Bank*, 91 Am. State Rep. 438, *First Nat. Bank v. Town of Millford*, 36 Conn. 93. *Bennett v. Judson*, 21 N. Y., 238. *U. S. v. Pan Am. Pet. Co.*, 24 Fed. 2nd, 209. It is also clear that the Savings Bank sustained detriment and money damage because of the conversion. It has lost its bonds. Its damage is the market value of them. Under such circumstances the responsibility of the National Bank and the right of *recover* in the Savings Bank is clear.

The defendant has cited many cases, of which *School Dist. of City of Sedalia, Mo. v. DeWeese*, 100 Fed. 705 is typical. I do not regard these authorities as in point here. In all of them, it appeared and was so held that the agent of the bank was acting in his individual capacity or at least was not acting within the apparent scope of his authority as the bank's agent. In the case at bar, however, I have already adverted to the clarity of the evidence that showed the transactions of Hart with the bonds in question to have been those of the National Bank. These facts clearly distinguish the case cited by defendant.

This brings us to a consideration of the final contention of defendants that there has been a compromise and settlement of all claims involving the irregularities and defalcations of Hart as City Treasurer and any claim of this plaintiff arising out of the bond transactions that are the subject matter of this action. In support of such contention, it was shown that after discovery of the loss of the securities involved in this suit and of the defalcations of Hart as City Treasurer, four actions were commenced, viz., (1) The Savings Bank commenced a suit against Hart and the surety on his official bond as City Treasurer to

recover the value of these securities converted by Hart. (2) The Savings Bank commenced a suit against the City of Merced to recover the value of the securities converted by Hart. (3) The City of Merced commenced a suit against the Savings Bank to recover the balance of the special deposit of City monies that remained on deposit in plaintiff bank as successor of the Savings bank and, (4) The City of Merced sued Hart and the corporate surety on his official bond to recover City monies of approximately \$30,000.00 that Hart misappropriated as City Treasurer, and which included the balance of the special deposit of city money with the Savings Bank amounting to \$14,000.00 which plaintiff bank, as successor of the Savings Bank refused to pay over to the city because of the conversion of the bonds by Hart. It further appeared that by negotiation, all of these four suits were dismissed and a settlement reached between litigants. In the settlement, the city received the balance of the special deposit amounting to \$14,000.00 from the plaintiff herein, as successor of the Savings Bank wherein the original deposit of \$25,000.00 was made by Treasurer Hart of the City's monies. In addition, the city of Merced received from the surety company \$11,000.00 in reimbursement for the defalcations of Hart of the city's money and in addition obtained an agreement from the surety company that it would hold the city harmless from any claim of the defendant receiver because of said outstanding city warrants amounting to approximately \$3,000.00. In disposing of the suit by the Savings Bank against Hart and the corporate surety on his official bond, it appeared that the surety company asserted the position that it was not liable to the Savings Bank, but an agreement was entered into

between the surety company and the plaintiff bank, as successor of the Savings Bank, which is evidenced by letters that were received in evidence. From these it appears that the surety company paid the various amounts hereinbefore stated and paid to plaintiff, as successor of the Savings Bank, the further sum of \$5,500.00, and as part of said adjustment and settlement it was further agreed that plaintiff, as successor of the Savings Bank would commence this action for the value of the bonds converted by the bank, and if it is successful in recovering against the National Bank and its Receiver, it would pay one-half of the net proceeds of the suit to the bonding company. There were other provisions in the settlement, which are immaterial in the consideration of the asserted defense of compromise and settlement. The record fails to substantiate the contention of defendants that plaintiff, as the Savings Bank's successor has accepted full satisfaction from the administrator of Hart's estate and has released his estate from any further liability on account of the conversion by Hart of the bonds in controversy. On the contrary, it appears that the plaintiff has presented its claim against the estate of Hart for the value of its securities that Hart misappropriated and it further appears that no settlement or payment of any kind has been made or received on said claim. All that was done by plaintiff or its assignor was to dismiss the suit against the Administrator of Hart's estate. The record shows no acknowledgment of satisfaction of the claim against Hart or his estate. It is true that where a suitor settles with one of two joint tort feasons and releases such one from further liability, his action is in effect a release of both joint tort feasons, but in my opinion, the proof in this complaint

falls short of bringing the facts of this case within the aforesaid rule. The action of the successor of the Savings Bank in dismissing the case against Hart and the corporate surety on his official bond as City Treasurer to recover the value of the securities converted amounted to nothing more than a covenant not to sue the Hart estate or the Surety Company and can not be said to have been the discharge of a joint tortfeasor that would operate to release a National Bank from its liability because of its conversion through the agency of Hart of the bonds of the Savings Bank. The letters consummating the settlement agreed upon by the Surety company, City of Merced and plaintiff contain a reservation by plaintiff as the Savings Bank's successor of its right to pursue the National Bank on Hart's default, and no acquittance is therein given to Hart's estate. The Estate of Hart stands in the position of the joint tortfeasor with the National Bank and it has never been released. Neither the surety company nor the city were joint tortfeasors with Hart or the National Bank. See *Gilbert vs. Finch*, 173 N. Y. 455.

However, it does appear that plaintiff has received \$5500.00 in the aforesaid settlement which must be applied in law to the demand sued on in this action. There can be but one compensation for an injury or tort of the kind that is involved in this suit, which is the market value of the securities converted at the time of conversion, with interest thereon until judgment. The plaintiff has received partial compensation of its loss. It is immaterial from whom any portion of such damage is paid, but any payment on account thereof reduces the liability pro tanto. Under the aforesaid rule and the evidence in this case, the defendants are undoubtedly entitled to a credit of \$5,500.00 on the claim here sued on.

It follows from the foregoing that plaintiff is entitled to findings and judgment under all issues of the complaint and answer herein for the sum of \$22,500.00 with interest thereon at the rate of 7% per annum from May 14, 1926, and for its costs of suit herein, all as prayed for in the complaint on file in this cause.

The motion of defendant for special or any findings or judgment contrary to the views expressed in the aforesaid memorandum opinion are and each is denied. Counsel for plaintiff will prepare, serve and present under the rules of this Court findings and judgment in accordance with the views hereinbefore expressed.

Paul J. McCormick
Paul J. McCormick
United States District Judge

Dated May 1, 1929.

Addenda to this Memorandum of Decision on Merits to be filed later.

[Endorsed]: Filed May 2, 1929 R. S. Zimmerman
Clerk By Louis J. Somers Deputy

[TITLE OF COURT AND CAUSE.]

No. 357-J

ADDENDA TO MEMORANDUM OF DECISION
ON MERITS

In the minute order for judgment in favor of plaintiff herein as well as in the Memorandum of Decision on Merits filed herein, the Court has allowed a reduction and diminution of the liability of defendants under the issues of this case for the sum of \$5,500.00, while the briefs of both counsel in this case refer to a payment of \$20,000.00 to the plaintiff herein by the corporate surety on the official bond of City Treasurer Hart, I have been unable to

find any evidence in the transcript of testimony and proceedings on trial of this case showing that the plaintiff herein actually received from the surety company the balance of the city's deposit of \$25,000.00 that remained in the Savings Bank at the time of the dismissal of the various suits concerning these transactions. The record is clear as shown by the testimony of Mr. F. W. Henderson, page 112, et seq. of the transcript and as disclosed by defendants exhibits E and G that it was part of the settlement that the plaintiff bank upon paying the balance of the city's special deposit to the city would be reimbursed by the surety company. I have not been able to find any further evidence showing that such reimbursement was actually made. Of course, if it is a fact that reimbursement was made and plaintiff actually received any sum of money in addition to the \$5,500.00 in the settlement, then under the Memorandum of Decision, defendants would be entitled to credit for such additional amounts received by plaintiff herein, and the order for findings and judgment in favor of plaintiff and against defendants should be correspondingly modified.

If counsel for the respective parties can not agree and file written stipulation herein concerning the reimbursement to plaintiff, and the actual receipt by it of the balance of said special deposit and the fact of such payment can be established, then the defendant will be entitled to pursue such procedure in this case as will show any amount of money in addition to said \$5,500.00 that plaintiff has received in the transactions concerning the dismissal of the four suits involved in this controversy.

Paul J. McCormick

Paul J. McCormick

United States District Judge

Dated May 2, 1929

[Endorsed]: Filed May 3rd, 1929 R. S. Zimmerman
Clerk By Louis J. Somers, Deputy.

At a stated term, to wit: The January Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 2nd day of May in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable PAUL J. McCORMICK, District Judge.

Bank of Italy National Trust and)
Savings Association, a National)
Banking Association,)
Plaintiff,)

vs.)

The Farmers & Merchants National)
Bank of Merced, a National Banking)
Association, and Henry P. Hilliard,)
as Receiver thereof,)
Defendants.)

CIVIL
NO. 357-J

The motion of defendant herein for an order of judgment in favor of defendants and against plaintiff and for special findings in favor of defendant herein and against plaintiff are denied in toto.

Findings and judgment are ordered for plaintiff and against defendants for the sum of \$22,500.00 with interest thereon at the rate of 7% per annum from May 14, 1926, with costs of suit herein, upon all issues made by the complaint and answer herein and as prayed for in plaintiffs complaint. Counsel for plaintiff will prepare, serve and present same under the rules of this Court. Memorandum Opinion filed herein this day. Dated May 2, 1929.

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This cause came on regularly for trial on the 24th day of October, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for plaintiff and Hartley F. Peart and Gallaher & Jertberg as attorneys for defendants, a trial by a jury having been expressly waived by said parties, which waiver was filed in said Court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties and said Court having duly considered the matter, the Court now finds:

I.

That the allegations and each of the allegations contained in paragraphs I, II, III and IV of said complaint are true.

II.

The Court further finds that it is true that on or about December 31, 1925, MERCED SECURITY SAVINGS BANK was the owner of, in possession of and entitled to the possession of certain negotiable bonds in said complaint and hereinafter described and that at said times J. B. HART was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, in the County of Merced, State of California, and at all of said times said J. B. HART was the President and Manager of said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED, and on or about said

date in pursuance of the statute of the State of California, referred to in said complaint, said MERCED SECURITY SAVINGS BANK deposited with said J. B. HART as such Treasurer said negotiable bonds as security for a certain deposit of \$25,000. of public moneys belonging to said City then in his custody as such Treasurer and thereupon said MERCED SECURITY SAVINGS BANK received from him as such Treasurer the sum of \$25,000. of public moneys belonging to said City.

III.

That on May 13, 1926, without the consent or knowledge of said MERCED SECURITY SAVINGS BANK and without the consent or knowledge of said CITY OF MERCED the said J. B. HART delivered the possession of said negotiable bonds to said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED.

IV.

The Court further finds that it is true that the said defendant THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED sold and converted to its own use and benefit without the knowledge or consent of MERCED SECURITY SAVINGS BANK or the CITY OF MERCED the following described negotiable bonds, the then property of the MERCED SECURITY SAVINGS BANK, to-wit:

<u>Number.</u>	<u>Description.</u>	<u>Face Value.</u>
27, 28	Santa Monica Storm Drain Bond	\$1000.00
22, 27, 28, 29	Santa Monica Fire Apparatus Bond	2000.00
27, 28, 29, 30	Santa Monica Bridge Improvement Bond	2000.00

27, 28, 29, 30	Santa Monica Sewer Bonds,	4000.00
751, 781, 798	City of Los Angeles Water Works Bonds,	3000.00
8625	City of Los Angeles Electric Power Bond,	1000.00

<u>Number.</u>	<u>Description.</u>	<u>Face Value.</u>
268, 269, 270, 271, 272,)		
274, 277, 280, 1020, 1021,)		
1022, 1023, 2057, 2058,)	(37) Turlock Ir-	
2059, 2279, 2280, 2281,)	rigation	
2282, 2283, 2498, 2499,)	Bonds of	
2500, 2501, 2502, 2503,)	\$400.00 each	\$14800.00
2504, 2505, 2506, 2507,)		
2508, 2509, 2510, 2511,)		
2512, 2513, and 2514)		

That of the bonds described in paragraph V. of the complaint filed in said action on or about May 12th, 1926, said MERCED SECURITY SAVINGS BANK for its own convenience and with the consent of J. B. HART, the then City Treasurer of the City of Merced and President and Manager of said The Farmers and Merchants National Bank of Merced, substituted other securities in place of the following described bonds which are of those described in said paragraph V, to-wit:

Santa Monica Storm Drainage Bonds of the face value of \$500.00 each, Nos. 21 and 22,	\$1000.00
Santa Monica Fire Apparatus Bonds, No. 21 of the face value of \$500.00,	500.00
Santa Monica Bridge Improvement Bonds, Nos. 21 and 22, of the face value of \$500.00 each,	1000.00
Santa Monica Sewer Bonds, Nos. 21 and 22, of the face value of \$1000.00 each,	2000.00

and at said time with the consent of said J. B. HART as Treasurer so as aforesaid and as security for the deposit of City funds as alleged in said complaint, the following described bonds were substituted:

City of Los Angeles Electric Power Bond No. 8625 of the face value of	\$1000.00
City of Los Angeles Water Works Bonds Nos. 751, 781 and 796 of the face value of \$1000.00 each,	3000.00

That at the time of the conversion of said bonds so as aforesaid by said defendant THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED the value thereof was and at all times since has been not less than \$28,000.00.

That said MERCED SECURITY SAVINGS BANK did not discover and had no knowledge of said conversion of said bonds, nor the sales thereof until subsequent to September 20, 1926, at which time the said THE FARMERS AND MERCHANTS NATIONAL BANK OF MERCED went into liquidation.

V.

That subsequent to said September 20, 1926, and prior to February 1st, 1927, said MERCED SECURITY SAVINGS BANK made proof of its claim herein, arising out of the facts alleged in said complaint for damages in the sum of \$28,000. for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said MERCED SECURITY SAVINGS BANK and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part

thereof has been paid except the sum of \$5500. which was paid by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, the corporate surety upon the official bond of said J. B. HART as City Treasurer; that there is unpaid upon the value of said sureties the sum of \$22,500.; that no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said sureties converted so as aforesaid at the time of said conversion is the sum of \$22,500.

VI.

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. HART as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said MERCED SECURITY SAVINGS BANK and/or to plaintiff herein other than said sum of \$5500.; that it is not true that said MERCED SECURITY SAVINGS BANK and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or by either of them by reason of any or all of the transactions of the said J. B. HART as such Treasurer, or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of \$5500.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS OF FACT THE COURT DEDUCES THE FOLLOWING:

That plaintiff is entitled to the judgment of this Court in the sum of \$22,500. with interest thereon at the rate

of seven percent (7%) per annum from May 13, 1926, to September 20, 1926, and for its costs of suit herein.

Let judgment be entered herein in favor of plaintiff establishing the said claim in the sum of \$22,500. for conversion of said bonds as a valid claim against said defendants and direct said Receiver to certify the same as a valid claim against defendants to the Comptroller of the Currency of the United States to be paid by him in the due course of the liquidation of the said Bank, together with interest on said sum at the rate of seven percent (7%) per annum from May 13, 1926, to September 20, 1926, Dated,, 1929.

Judge of said Court.

Approved as to form as provided in Rule 44.

Attorneys for Defendants.

[Endorsed]: Filed June 28 1929 R. S. Zimmerman
Clerk By Louis J. Somers Deputy.

[TITLE OF COURT AND CAUSE.]

NO. 357-J CIVIL.
EXCEPTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

Come now the defendants in the above entitled action, and jointly and severally object to and take exceptions to the proposed findings of the plaintiff herein, as to form and substance in that the form of said findings and the substance thereof, do not include the following matters

material to a determination of a legal judgment in said action, which said matters should be found in the findings in the above entitled action, to wit:

—I—

That on September 1st, 1926, the said Merced Security Savings Bank, the predecessor in interest of the plaintiff in the above entitled action, paid to the treasurer of the City of Merced for the use and benefit of said City the sum of \$10,422.55 of said Special Deposit, which Special Deposit was the sum of \$25,000, as hereinabove found; that on the 23rd day of August, 1927, the said plaintiff herein paid to the City of Merced the further sum of \$15,047.02; that the said sum of \$10,422.55 and the said sum of \$15,047.02 aggregated the total of said Special Deposit of \$25,000 together with interest thereon at the agreed rate of $2\frac{1}{2}\%$ on daily balances in said account; that the said sum of \$5500.00 paid by the Fidelity & Deposit Company of Maryland was paid on or about the 12th day of August, 1927.

—II—

That the said sum of \$15,047.02 so paid of said Special Deposit and the accrued interest thereon by the said plaintiff to the said City of Merced on or about the said 23rd day of August, 1927, was then and there repaid to the said bank in full to wit, in the sum of \$15,047.02, by the said Fidelity & Deposit Company of Maryland, the Corporate Surety upon the official bond of said J. B. Hart, as such City Treasurer of the said City of Merced, and that said plaintiff received from said Fidelity and Deposit Company of Maryland the said sum of \$15,047.02 and appropriated and applied the said sum, and all thereof, to its own use.

—III—

That the said plaintiff and its said predecessor in interest have received the full sum of \$20,547.02 of said Special Deposit, and have appropriated the same to the use and benefit of the said plaintiff.

—IV—

That said payments of the said respective sums of \$5500.00 and of \$15,047.02 made by the said Fidelity & Deposit Company of Maryland to the said plaintiff and its predecessor in interest, were made and paid by way of compromise and settlement of those certain suits and actions then and theretofore pending in the Superior Court of the State of California, in and for the County of Merced, to wit, an action of the Merced Security Savings Bank, a corporation, plaintiff vs. J. B. Hart and the Fidelity & Deposit Company of Maryland, surety for said J. B. Hart as treasurer of the City of Merced, to recover the value of the securities described in the complaint herein, which were deposited by said Merced Security Savings Bank with the said J. B. Hart, as treasurer of said City of Merced; also an action by said Merced Security Savings Bank, a corporation, against the City of Merced, to recover the value of said same securities; also an action by the City of Merced against the Merced Security Savings Bank to recover the then balance of the Special Deposit of \$25,000 made by the said J. B. Hart as City Treasurer of the City of Merced, as alleged in the complaint herein, which part thereof was remaining on deposit in the said Merced Security Savings Bank; also an action wherein the City of Merced was plaintiff, and the Administrators of the Estate of J. B. Hart, deceased, and the Fidelity & Deposit Company of Maryland, a cor-

poration, surety for said J. B. Hart, as treasurer of said City of Merced, were defendants, which action sought to recover the alleged defalcations of the said city's moneys by the said J. B. Hart, deceased, while treasurer of the said City of Merced, in the aggregate sum of more than \$30,000.00, and which said claim included the then remaining balance of the Special Deposit hereinabove mentioned amounting to in excess of \$14,000 principal with accrued interest.

That upon the payment of said sums by said Fidelity & Deposit Company of Maryland, and the payment by said Fidelity & Deposit Company of Maryland of the further sum of \$11,000.00 to the said City of Merced, each and all of said causes and actions hereinabove referred to, were dismissed.

Said defendants except to the Conclusions of Law as to form and substance in this: that the Conclusions of Law should be in the following form and substance:

“AS CONCLUSIONS OF LAW FROM THE FOREGOING FINDINGS OF FACT, THE COURT FINDS:

1: That the plaintiff in the above-entitled action, and its predecessor in interest, the Merced Security Savings Bank, have received satisfaction for all of the claims set up and alleged in the complaint herein, and that the plaintiff is entitled to take nothing by reason of its complaint herein, and the defendants are entitled to judgment for costs incurred herein.”

Hartley F. Peart

Gallaher & Jertberg

Attorneys for defendants.

[Endorsed]: Filed Jun. 28, 1929. R. S. Zimmerman,
Clerk By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CIVIL NO. 357-J

NOTICE OF MOTION TO REOPEN CASE FOR
PURPOSE OF TAKING DEPOSITIONS.

To the plaintiff above named and to F. W. Henderson,
its Attorney :

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE, that on Friday, the 28th day of June, 1929, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the court room of the above-entitled court, in the Federal Building, located in the City of Los Angeles, County of Los Angeles, State of California, the defendant above named will move the above entitled court for an order permitting the defendants to take the depositions of Guy LeRoy Stevick, Vice-President of the Fidelity & Deposit Company of Maryland, a resident of the City and County of San Francisco, and of the Manager of the Branch Bank of the plaintiff corporation, located in the City of Merced, County of Merced, State of California, to establish that the said plaintiff received from said Surety Company the sum of \$15,047.02, being the total of principal with accrued interest thereon of the special deposit of the City of Merced in said bank at the time the following cases pending in the Superior Court of the State of California in and for the County of Merced, were stipulated to be dismissed:

1: The Merced Security Savings Bank, under which plaintiff was then transacting business, commenced a suit against Hart and the Surety on his official bond to recover the value of the securities.

2: The same party commenced a suit against the City of Merced to recover the value of the securities.

3: The City of Merced commenced a suit against the Merced Security Savings Bank to recover the balance of the special deposit then remaining on deposit in the plaintiff bank.

4: The City of Merced commenced a suit against Hart and the surety on his official bond to recover on account of his defalcations of the city's moneys, which aggregated over \$30,000 and which included the balance of the special deposit amounting to \$14,000 held by plaintiff bank, and which it refused to pay over.

And that the depositions so taken shall be used and considered by the court as evidence in the case, and that said case be reopened for the purpose of receiving said evidence.

If it be found that the said Guy LeRoy Stevick and that the said Manager of said Branch bank are unacquainted with the facts, that the deposition of such officer or officers of said Surety Company and said bank, respectively, as are informed as to whether or not said money was paid by said Surety Company, and received by said bank, be taken.

This motion will be based upon all of the records, files and transactions of the above case and upon the affidavit of M. G. Gallaher, one of the attorneys for the defendant in the above entitled action, which affidavit is attached hereto.

Hartley F. Peart
Gallaher & Jertberg

Q In the interim the Merced Security Savings Bank had then transferred its assets to the Bank of Italy National Trust & Savings Association?

A Yes, sir.

Q The amount that you have mentioned there totaled an amount in excess of \$25,000. What was it that difference represented?

A Represented interest on the deposit.

Q The obligation of the bank, according to the application for City funds, was to pay interest at the rate of 2½% on daily balance; is that right?

A Yes, sir.”

(As appears from lines 6 to 22 inc., transcript of the evidence in the above entitled case)

Mr. F. W. Henderson testified on behalf of the defendants in said action, stating:

“I have a letter, Mr. Gallaher, that probably would state that more clearly than this. The Fidelity & Deposit Company of Maryland paid to the City of Merced \$11,000 in cash, as I recall it, and subsequent to that time, or about that time, the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter; but the interest is calculated.

THE COURT: \$15,047.02.

A I think that is it.

THE COURT: That has already been shown.

MR. GALLAHER: Very well. Now that was done by agreement between the City of Merced, the Bank of Italy and the Fidelity & Deposit Company, was it not?”

A Well, those payments were made on account of the suit that you have spoken of here, that is referred to, and also on account of the suit that the City of Merced brought

against the Merced Security Savings Bank, and which suit involved the balance of the deposit that had been made by J. B. Hart as treasurer with the Merced Security Savings Bank.”

(As appears from line 9, p. 112 to line 4, p. 113, transcript of the evidence in the above case.)

Also

“THE COURT: There seems to have been four suits brought.

MR. GALLAHER: Yes.

A I think so.”

(As appears from lines 22 to 24, p. 114, Transcript of the evidence in the above case.)

Also

“THE COURT: Wasn't there a cross-action; didn't you say there was a cross-action by the Bank against the City?

A Yes.

Q Was that disposed of? A Yes.”

(As appears from line 22 to 26, p. 115, Transcript of the evidence in the above case.)

Also

“Q At any rate, after these several actions, or four actions were brought, then all of the parties, including the official bondsmen of J. B. Hart, the Fidelity & Deposit Company and the Bank of Italy and its predecessor and the City of Merced compromised and settled all of those suits by the City releasing any claim against either the Deposit Company of the bank, upon the Deposit Company paying to the City \$11,000, and the bank paying the remainder of the \$25,000 deposit plus accrued interest on that remainder?”

A No, that is not the settlement, Mr. Gallaher. I have some correspondence there which will show just what the final disposition of the matter was; that is in writing.

MR. GALLAHER: Well, get your correspondence.

A Here is a letter from Louis Ferrari from the bonding company formally closing the transaction."

(As appears from line 15, p. 116 to line 3, p. 117, transcript of the evidence in the above case.)

Two letters were then introduced as one exhibit, being "Defendants' Exhibit E."

(As appears from lines 19 to 21, p. 117, Transcript of the evidence in the above case.

Also, letter of Louis Ferrari to Mr. Henderson, introduced as Defendants' Exhibit "H," and also letter of August 16, 1927, from the Fidelity & Deposit Company, Defendants' Exhibit "H."

Also, Mr. Henderson testified:

"A Here is a letter to Louis Ferrari from the bonding company formally closing the transaction.

Q That was a settlement of all of them; this litigation?

A This letter states—this letter was written and declares a part of the terms of the settlement.

Q Of all of the litigation between these four various parties?

A In connection with that."

(As appears from lines 2 to 9 inc. p. 117, Transcript of the evidence in the above case)

The letter referred to is as follows:

"FIDELITY AND DEPOSIT COMPANY
(Letterhead)

August 12, 1927.

"Mr. LOUIS Ferrari,
Vice President,
Bank of Italy,
San Francisco.

In re J. B. HART.

Dear Sir:

I beg to confirm the terms of settlement of claims against us under the above bond, to wit:

1. We will pay to the City of Merced, the sum of \$11,000.

2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating \$3,027.62.

3. We will pay to you the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).

4. We will pay to you further the sum of \$5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.

5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds missappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any

loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.

I am sending a copy of this letter to Mr. Henderson, and *he if* and you advise that this is satisfactory we will make payment forthwith.

Yours very truly,

(signed) Guy LeRoy Stevick,
Vice-President."

Affiant further says that in view of the fact that the said Henderson testified that said letter was a letter "formally closing the transaction" and that said letter agreed to pay to the Bank of Italy the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (this amount to be paid by you to the City)" established the fact in connection with Henderson's testimony, that that letter closed the transaction with reference to all four cases; that the Fidelity & Deposit Company did pay to the plaintiff the sum of \$15,047.02, which amount was, as shown by the testimony of O. A. Turner, paid to the City of Merced for the remainder of the principal and interest of the Special Deposit, and affiant in the conduct of said trial inadvertently omitted to prove by direct positive statement of any witness that said sum of \$15,047.02 was actually paid by said Fidelity & Deposit Company to said plaintiff, and affiant is informed and believes, and upon such information and belief alleges the fact to be that said sum of \$15,047.02 was actually paid by said Fidelity & Deposit Company to said plaintiff, pursuant to said letter, and was paid prior to August 23, 1927, and was on August 23, 1927, paid to the City of Merced by said plaintiff, and that the officers of said plaintiff bank

and of said Fidelity & Deposit Company are informed of said fact and will so testify if their depositions be taken.

M. G. Gallaher

[Seal]

Subscribed and sworn to before me this 21st day of June, 1929.

Evelyn Edwards

Notary Public in and for the County of Fresno,
State of California.

[Endorsed]: Filed Jun 28 1929 R. S. Zimmerman,
Clerk By Louis J. Somers, Deputy Clerk

At a stated term, to wit: The April Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of June in the year of our Lord one thousand nine hundred and twenty-nine

Present:

The Honorable Paul J. McCormick, District Judge.

Bank of Italy National Trust and)
Savings Association, a National)
Banking Association,)
Plaintiff,)
vs.)

The Farmers and Merchants Na-)
tional Bank of Merced, a National)
Banking Association and Henry P.)
Hilliard, as Receiver thereof,)

Defendants.)

No. 357-J Civ.

This cause coming on for hearing on Motion to reopen case for the purpose of taking depositions, and for hearing

on Exceptions to proposed findings of fact and conclusions of law; Motion to reopen is now presented by Gilbert Jertberg, Esq., as counsel for the defendants, and F. W. Henderson, Esq., appearing as counsel for the plaintiff, replies, and having at this time filed proposed findings and presented same for settlement, a statement in reply is made by Attorney Gilbert Jertberg, who argues in furtherance of defendants' Exceptions to proposed findings, whereupon objections to findings of fact and conclusions of law are tentatively sustained; Motion of defendants to reopen cause is granted, for hearing evidence on the one issue stated in Motion to reopen, alone, and it is ordered that either litigant may introduce testimony on that issue; making and entry of findings of fact and conclusions of law herein are ordered suspended until further order of the Court. It is now stipulated by counsel in open court that depositions of officers named in Motion of respective corporations be taken, and that depositions, when taken, be returned by notary public to this court, and that matter then stand submitted, which stipulation is approved by the Court.

At a stated term, to wit: The April Term, A. D. 1929 of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 21st day of August in the year of our Lord one thousand nine hundred and twenty-nine.

Present:

The Honorable Paul J. McCormick, District Judge.

BANK OF ITALY NATIONAL)
TRUST AND SAVINGS AS-)
SOCIATION, a National Banking)
Association,)

Plaintiff,)

vs.)

THE FARMERS & MER-)
CHANTS NATIONAL BANK)
OF MERCED, a National Bank-)
ing Association, and HENRY P.)
HILLIARD, as Receiver thereof,)

Defendants.)

No. 357-J

MINUTE ORDER FOR JUDGMENT UPON SUB-
MISSION OF CAUSE SUBSEQUENT TO
ORDER REOPENING SAME.

It now appearing from stipulation filed herein July 17, 1929, that this action is now submitted for decision and upon consideration of said stipulation and the deposition of Guy Leroy Stevick filed herein July 20, 1929, it is now ordered pursuant to the Memorandum of Decision on Merits and addenda to Memorandum of Decision on Merits heretofore made and filed herein that findings and judgment are ordered for plaintiff herein according to the prayer of its complaint, less the sum of \$5,500.00 and an additional sum of \$15,047.02, for which amounts credit must be given in such findings and judgment.

Plaintiff's counsel will accordingly prepare, serve, and present findings and judgment in accordance herewith under the rules of this Court.

Dated August 21, 1929.

[TITLE OF COURT AND CAUSE.]

NO. 357-J CIVIL.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW.

This cause came on regularly for trial on the 24th day of October, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for Plaintiff, and Hartley F. Peart and Gallaher & Jertberg, as attorneys for defendants; a trial by a jury having been expressly waived in writing by said parties, which waiver was filed in said court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties, and thereafter the Court having vacated the order submitting said cause and ordering the taking of further testimony in said matter, which has been done in conformity to said order, and the said cause having thereafter been ordered submitted to said Court for decision and said Court having duly considered the matter, the Court now finds:

I

That the allegations and each of the allegations contained in paragraphs I, II and III of said complaint are and each of them is true.

II

That the allegations and each of the allegations contained in paragraph IV of said complaint are true, except the allegation in said paragraph in said complaint contained, as follows: "to the damage of said Merced Security Savings Bank in the sum of \$28,000" and the Court finds in this connection that the said Merced Security Savings Bank was damaged in the sum of \$27,300.

III

That it is not true as alleged in paragraph VI of the complaint that at all times in the complaint mentioned said negotiable bonds were of the market value of \$28,000, or any other sum in excess of \$27,300.

IV

The Court further finds that it is true that on or about December 31, 1925, MERCED SECURITY SAVINGS BANK was the owner of, in possession of and entitled to the possession of certain negotiable bonds in said complaint and hereinafter described, and that at said time J. B. HART was the duly elected, qualified and acting Treasurer of the City of Merced, a municipal corporation, in the County of Merced, State of California, and at all of said times said J. B. HART was the President and Manager of said The Farmers and Merchants National Bank of Merced, and on or about said date in pursuance of the statute of the State of California, referred to in said complaint, said Merced Security Savings Bank deposited with said J. B. HART as such Treasurer said negotiable bonds as security for a certain deposit of \$25,000 of public moneys belonging to said City then in his custody as such Treasurer and thereupon said Merced Security Savings Bank received from him as such Treasurer the sum of \$25,000 of public moneys belonging to said City, and said sum of \$25,000 was deposited in said plaintiff's bank to the credit of said City of Merced and subject to the warrants of said City of Merced duly allowed and executed and presented for payment: that various warrants were presented for payment and were paid out of said funds, but said account was carried until the 23rd day of August, 1927, at which time there was then in said account and in

the possession of said Bank the sum of \$14,577.45, which sum on said 23rd day of August 1927 was paid out by said Bank to the said City of Merced and said account was then and there closed

V

That on May 12, 1926, without the consent or knowledge of said Merced Security Savings Bank and without the consent or knowledge of said City of Merced the said J. B. HART delivered the possession of said negotiable bonds to said The Farmers and Merchants National Bank of Merced.

VI

The Court further finds that it is true that the said defendant The Farmers and Merchants National Bank of Merced sold and converted to its own use and benefit without the knowledge or consent of Merced Security Savings Bank or the City of Merced the following described negotiable bonds, the then property of the MERCED SECURITY SAVINGS BANK, to wit:

<u>Number</u>	<u>Description.</u>	<u>Face Value.</u>
27, 28	Santa Monica Storm Drain Bond	*\$1000.00
22, 27, 28, 29	Santa Monica Fire Apparatus Bond	2000.00
27, 28, 29, 30	Santa Monica Bridge Improve- ment Bond	2000.00
27, 28, 29, 30	Santa Monica Sewer Bonds	4000.00
751, 781, 796	City of Los Angeles Water Works Bonds	3000.00
8625	City of Los Angeles Electric Power Bond	1000.00

<u>Number</u>	<u>Description.</u>	<u>Face Value.</u>
268, 269, 270, 271, 272,)		
274, 277, 280, 1020, 1021,)		
1022, 1023, 2057, 2058,)	(37) Turlock Irrigation Bonds	
2059, 2279, 2280, 2281,)	of \$400.00	
2282, 2283, 2498, 2499,)	Each,	\$14800.00
2500, 2501, 2502, 2503,)		
2504, 2505, 2506, 2507,)		
2508, 2509, 2510, 2511,)		
2512, 2513, and 2514.)		

That of the bonds described in paragraph V of the complaint filed in said action on or about May 12th, 1926, said MERCED SECURITY SAVINGS BANK for its own convenience and with the consent of J. B. HART, the then City Treasurer of the City of Merced and President and Manager of the said The Farmers and Merchants National Bank of Merced, substituted other securities in place of the following described bonds which are of those described in said paragraph V, to wit:

Santa Monica Storm Drainage Bonds of the face value of \$500.00 each, Nos. 21 and 22	\$1000.00
Santa Monica Fire Apparatus Bonds, No. 21, of the face value of \$500.00,	500.00
Santa Monica Bridge Improvement Bonds Nos. 21 and 22, of the face value of \$500.00 each,	1000.00
Santa Monica Sewer Bonds, Nos. 21 and 22, of the face value of \$1000.00 each,	2000.00

and at said time with the consent of said J. B. HART as Treasurer so as aforesaid and as security for the deposit of City funds as alleged in said complaint, the following described bonds were substituted:

City of Los Angeles Electric Power Bond No. 8625 of the face value of	\$1000.00
City of Los Angeles Water Works Bonds Nos. 751, 781 and 796 of the face value of \$1000.00 each,	3000.00

That at the time of the conversion of said bonds so as aforesaid by said defendant THE FARMERS and MERCHANTS NATIONAL BANK OF MERCED the value thereof was and at all times since has been not less than \$27,300.00.

That said Merced Security Savings Bank did not discover and had no knowledge of said conversion of said bonds, nor the sales thereof until subsequent to September 20, 1926, at which time the said The Farmers and Merchants National Bank of Merced went into liquidation.

VII

That subsequent to said September 20, 1926, and prior to February 1st, 1927, said MERCED SECURITY SAVINGS BANK made proof to its claim herein arising out of the facts alleged in said complaint for damages in the sum of \$27,300 for the said conversion of said bonds, which said proof of claim was in writing, duly verified by the Cashier of said MERCED SECURITY SAVINGS BANK and presented to said defendants for allowance and they did on or about February 1st, 1927, reject the said claim and have refused to allow the same or any part thereof or to pay anything thereon; that no part thereof has been paid except the sum of \$20,547.02, which was paid by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND, the corporate surety upon the official bond of said J. B. Hart as City Treasurer, which said sum of \$20,547.02 was so paid by said Fidelity and Deposit

Company of Maryland to said plaintiff in the above-entitled action on the 23rd day of August, 1927; that there is unpaid upon the value of said securities the sum of \$6,752.98, no part of which has been paid by said defendants or either of them; that the balance unpaid upon the market value of said securities converted so as aforesaid at the time of said conversion is the sum of \$6,752.98.

VIII

That it is not true that a surety company paid and/or discharged all or any of the obligations of said J. B. HART as City Treasurer of the City of Merced and of said surety company as his surety as such public officer to said Merced Security Savings Bank and/or to plaintiff herein other than said sum of \$20,547.02; that it is not true that said MERCED SECURITY SAVINGS BANK and/or said plaintiff has received from any surety company full pay and/or compensation for any and/or all losses sustained by them or either of them by reason of any or all of the transactions of the said J. B. Hart as such Treasurer, or in any manner whatsoever in connection with any and/or all of the bonds mentioned in the complaint filed in said action other than said sum of \$20,547.02.

AS CONCLUSIONS OF LAW FROM THE FOREGOING FACTS, the Court finds the following:

That plaintiff be entitled to the judgment of this Court in the sum of \$6,752.98, with interest thereon at the rate of seven per cent (7%) per annum from August 23, 1926, to September 20, 1926, and for its costs of suit herein.

Let judgment be entered herein in favor of plaintiff establishing the said claim in the sum of \$6752.98 for conversion of said bonds as a valid and preferred claim against said defendants and directing said Receiver to

certify the same as a valid and preferred claim against defendants to the Comptroller of the Currency of the United States to be paid in full by him in the due course of the liquidation of the said Bank, together with interest on said sum at the rate of seven percent (7%) per annum from August 23, 1926 to September 20, 1926.

Dated Jan. 27th, 1930.

Paul J. McCormick
Judge of said Court

Approved as to form as provided in Rule 44.

Hartley F. Peart

Gallaher & Jertberg

Attorneys for Defendants.

[Endorsed]: Filed Jan 29, 1930. R. S. Zimmerman
Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil

JUDGMENT

This cause came on regularly for trial on October 24, 1928, Louis Ferrari, J. J. Posner and F. W. Henderson, appearing as attorneys for plaintiff and Hartley F. Peart and Gallaher and Jertberg as attorneys for defendants, a trial by Jury having been expressly waived in writing by said *partes*, which waiver was filed in said Court; oral and documentary evidence was adduced by the respective parties and the same was submitted to the Court for decision upon briefs of the respective parties, and thereafter the Court having vacated the Order submitting said cause

and ordering the taking of further testimony in said matter, which has been done in conformity to said order, and the said cause having thereafter been ordered submitted to said Court for decision and said Court having duly considered the matter, and having settled, allowed and signed its findings of fact and conclusions of law therein and ordered judgment in favor of plaintiff against defendants in accordance therewith.

NOW THEREFORE, in accordance with the findings of fact and conclusions of law referred to Judgment is hereby entered in favor of plaintiff against defendants establishing its claim against them in the sum of \$6,752.98 for conversion of the bonds referred to in said findings as a valid and preferred claim against said defendants and said Receiver Defendant therein, is hereby directed and ordered to certify the same as a valid and preferred claim against said defendants to the Comptroller of the Currency of the United States to be paid in full by him to said Receiver in the course of the liquidation of the said Bank, together with interest on said sum at the rate of seven (7%) percent per annum from August 23, 1926 to September 20, 1926, to-wit: \$36.76, and for costs of suit herein in the sum of \$58.15

Dated: January 27th, 1930.

Paul J. McCormick
Judge of said Court.

Approved as to form as provided in Rule 44

Hartley F. Peart

Gallaher & Jertberg

Attorneys for Defendants.

(Testimony of O. A. Turner.)

JUDGMENT ENTERED JANUARY 29th, 1930,

R. S. ZIMMERMAN Clerk

By Louis J. Somers,

J. Bk. 2/30.

Deputy Clerk.

[Endorsed]: Filed Jan. 29, 1930, R. S. Zimmerman,
Clerk, By Louis J. Somers, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 357-J - CIVIL

BILL OF EXCEPTIONS.

This cause came on regularly for trial before the court sitting without a jury, a jury having been by written stipulation, as required by law, waived, F. W. Henderson appearing for the plaintiff and Messrs. Hartley F. Peart and Gallaher & Jertberg appearing for the defendants. An opening statement was made on behalf of plaintiff during which it was stipulated between the parties to the action that the City of Merced at all times mentioned in the complaint was a city of the sixth class, organized under the Municipal Incorporation Act of the State of California, and thereupon the following proceedings were taken and had:

TESTIMONY OF O. A. TURNER.

O. A. Turner, a witness called on behalf of plaintiff, testified as follows: "I am employed by the plaintiff in this action at its Merced Branch as Assistant Manager and Assistant Trust Officer. Prior to my employment

(Testimony of O. A. Turner.)

with it I was employed by Merced Security Savings Bank for approximately seventeen years as Assistant Cashier. I knew J. B. Hart in his life time and during the time that he was City Treasurer of the City of Merced and during the same time I knew him to have been the President of Farmers & Merchants National Bank of Merced, its active and executive officer. I succeeded Mr. Hart as Treasurer by appointment in the latter part of September, 1926 and since by election and I am now City Treasurer. In December of 1925 on behalf of Merced Security Savings Bank I had dealings with J. B. Hart as Treasurer of said city in connection with the deposit of certain funds belonging to the City of Merced amounting to \$25,000.00 in Merced Security Savings Bank. It had made written application to J. B. Hart as Treasurer for the deposit of that amount of city funds. The original application cannot be found. This is a copy of it." Thereupon it was offered in evidence, marked Plaintiff's Exhibit 1. "After this application was made Merced Security Savings Bank turned over to J. B. Hart as Treasurer of said city the bonds described in said application. This was on or about the date of the application. On or about May 12, 1926 Merced Security Savings Bank made out a second application for deposit of city funds. At that time the bank had not paid back to Mr. Hart as Treasurer or to the city any of the original deposit of \$25,000.00 which it received from Hart as such Treasurer funds of said city contemporaneously with the delivery of said bonds. At the time of the second application in lieu of the Santa Monica bonds described in the first application amounting to \$4500.00 in par value there was substituted \$4000.00

(Testimony of O. A. Turner.)

par value of Los Angeles bonds. From the time the first bonds were put up in December, of 1925 with Mr. Hart he kept them continuously so far as I know with the exception of the Santa Monica bonds which were substituted for Los Angeles bonds neither Merced Security Savings Bank nor its successor, the plaintiff in this action, received from J. B. Hart or any one else at any time whatsoever any of the bonds that were placed as collateral security for the first deposit other than the Santa Monica bonds for which the Los Angeles bonds were substituted nor any of the Los Angeles bonds referred to after their substitution. The second application made to Hart as Treasurer was in writing. The original is lost. This is a copy thereof." At this point the second application was introduced and admitted in evidence and marked Plaintiff's Exhibit 2. With the exception of the substitution mentioned the original deposit of bonds was left intact.

"On September 1, 1926, some months after the second application was made, the Merced Security Savings Bank paid over to the City of Merced of the original deposit of \$25,000.00 upon warrants drawn the sum of \$10,422.55. On August 23, 1927 the plaintiff in this action paid to the City of Merced the balance of the special deposit plus accrued interest, in all \$15,047.02. The city was entitled to interest at the rate of 2½ per cent. per annum on the daily balance of funds belonging to the city on deposit with the plaintiff. The Bank of Italy, plaintiff in this action, has succeeded by a transfer in writing duly executed to all of the rights of Merced Security Savings Bank in the bonds in question." At this point plaintiff offered in evidence and there was received and marked as Plain-

(Testimony of O. A. Turner.)

tiff's Exhibit 3 the written transfer executed by Merced Security Savings Bank of all of its assets to plaintiff.

"The market value of the securities described in the second application and the ones involved in this action was on or about May 13, 1926 and continuously since said time has been approximately par. to wit, \$27,800; that interest coupons attached thereto would bring the highest market value since that time to approximately \$28,000.

CROSS EXAMINATION.

"I became Treasurer of the City of Merced in September, 1926 and have been such treasurer ever since that time. At the present time I am Assistant Manager and Assistant Trust Officer Merced Branch of the plaintiff. I did not personally transact the business with reference to the deposit of city funds by J. B. Hart as city treasurer and the delivering of the bonds. That was done by H. B. Stoddard on behalf of Merced Security Savings Bank. Since the sale of its assets Mr. Stoddard has not been connected with the Merced Security Savings Bank and has not at any time been connected with the plaintiff bank. I entered the employ of plaintiff January 1, 1927; before that I was cashier of Merced Security Savings Bank. I had personal knowledge of the transaction relating to the deposit of city funds and the turning over of bonds by the bank to Hart as Treasurer. Our bank got \$25,000.00. On September 21, 1926 Merced Security Savings Bank returned to the city \$10,426.55. We paid a check for that amount, that is the check of the Treasurer of the City of Merced. On August 23, 1927 we paid a City of Merced warrant amounting to \$15,047.02 direct to the City of Merced. None of the bonds that we had put up

(Testimony of O. A. Turner.)

were ever returned to, or received by, the Merced Security Savings Bank or the plaintiff bank. At the time the plaintiff bank paid to the city the \$15,000. plus it did not demand the return of any of its securities and none were returned. On September 1, 1926 when the \$10,000.00 plus was paid back J. B. Hart was then City Treasurer. At that time no demand was made by the Merced Security Savings Bank for the return of any of the securities that had been placed by the bank with the City Treasurer and no bonds were returned by the City Treasurer to the bank. None of the bonds of the face value of \$27,800.00 or thereabouts have ever been returned to Merced Security Savings Bank or to the plaintiff bank. I do not know if any demand was made on J. B. Hart for their return."

Q. by Mr. Gallaher: Why was it that you paid out \$10,000. plus without taking up any of those bonds? A. "Well, it was an active account and our deposits were high some days and low on others. Naturally on any active account we expect the deposit to be active and at that time we did not withdraw the collateral. By an active account I mean one that might be added to or taken from at any time. one that is not dormant. We were of the opinion that Hart would keep his balance up to that amount (\$25,000.00). I do not know why when the payment of \$15,000.00 plus which closed that account was made in August, 1927 it was made without taking any of the securities. I did not have anything to do with that particular transaction other than to receive, as City Treasurer, the payment." At this point Mr. Henderson, as attorney for plaintiff, and Mr. Gallaher representing the defendants engaged in a discussion with reference to the demand for

(Testimony of W. E. Landram.)

the return of the bonds concerning which Mr. Gallaher inquired upon whom the written demand was made to which Mr. Henderson answered, "Upon the Treasurer of the city and the city itself as represented by the Board of Trustees. The then Treasurer was Mr. Turner. Hart resigned in 1926 and died shortly afterwards. After this demand was made plaintiff bank paid over the balance of the account to the City Treasurer. No securities were returned for the reason that none were held by the city or the Treasurer at that time."

TESTIMONY OF W. E. LANDRAM.

W. E. Landram, called as a witness on behalf of plaintiff, after being duly sworn, testified as follows: "I was vice-president of Farmers and Merchants National Bank for three or four years, that is in the latter part of 1924, in 1925 and in 1926 until the bank failed. I knew J. B. Hart. During the time I was connected with the bank he was President and Active Manager. Early in 1926 I received instructions from J. B. Hart with reference to certain bonds that were subsequently sold to the First National Bank in Fresno. He called me in from the front of the bank into where he was doing business at his desk and says: 'Here is a roll of bonds' which he had wrapped up and tied up and he says, 'I have made arrangements with Mr. Vaughn at Fresno to take these bonds. It is now a quarter past one or about that time and you will have to get in your car and hurry down there before their bank closes. I want you to deliver them to Mr. Vaughn and he will give you a draft for it which I was acting as messenger to do.' He said just to mention to Mr. Vaughn,

(Testimony of W. E. Landram.)

'These bonds, I may want to take them up later on.' I naturally inferred there would be a note sent down to sign. I asked him if there was anything else but there was no note or anything of the kind. After being so instructed I took the roll that he gave me and came to the First National Bank in Fresno and delivered them and got a draft and returned to Merced. I dealt with three here in Fresno. Mr. Vaughn referred me to a man—I cannot tell his name, commenced with Z, and told me he would take care of me. This was in the First National Bank in Fresno. This man went out with the bonds in the other room, said he wanted to go out and look up the list. When I got to Fresno I went to Mr. Vaughn and said to him, 'Here is some bonds Mr. Hart asked me to bring down and said he had arranged with you to take care of the matter and you would give me a draft to return.' They then counted them (the bonds) and gave me a draft. I then returned to Merced. I saw Mr. Hart. He was at the Farmers & Merchants National Bank when I returned at five o'clock. He asked if everything was all right and I says, 'The draft shows it, don't it?' I gave it to Mr. Hart. I do not know what became of it afterwards. I think it was payable to our correspondent in San Francisco, American National Bank. We had two correspondents for a while and I think it was at that time The American National Bank. Later on, about two or three months after that or whatever time it was—it was in the same year, in the spring of the year, Hart asked me to return to Fresno and get the bonds and gave me a check to take them up. When I got the bonds first from Mr. Hart I did not examine the package to see what was contained therein nor at any

(Testimony of W. E. Landram.)

time afterwards. After the package had been opened in Fresno in the First National Bank and when he came back in there to give me the draft he had the bonds with him and says, 'Here is the bonds' and counted them out. When Hart told me to go to Fresno and get the bonds and gave me a draft for them he said, 'I want to make some changes in these and sell them—part of them.' I went to Fresno to the same man in the First National Bank there and told him that Mr. Hart wanted the bonds back. I think it was Mr. Vaughn I saw. I got the return of the bonds, I gave him the draft and paid them the difference in interest that had accrued there and took the bonds and returned to Merced. I think these are the instruments which he gave me" (referring to plaintiff's Exhibit 4, two cashier's checks, one for \$10,000.00 and one for \$18,000.00 and the personal check of W. E. Landram for \$521.68 which were then offered and admitted in evidence and marked Plaintiff's Exhibit 4). At this point it was stipulated between counsel that on March 27, 1926 the First National Bank in Fresno delivered to W. E. Landram a draft drawn payable to the Farmers & Merchants National Bank of Merced for the sum of \$28,300.00 drawn on the American Bank of San Francisco which was placed to the credit of the Farmers & Merchants National Bank of Merced in the Federal Reserve Bank of San Francisco which was a correspondent of the Farmers and Merchants National Bank of Merced. The witness continued: "One of the three instruments which were used in connection with the second transaction that I had to do with these bonds is a check dated May 12, 1926 for \$521.68 payable to the First National Bank in Fresno, signed by me and drawn

(Testimony of W. E. Landram.)

on the Farmers & Merchants National Bank of Merced. This was filled out in the First National Bank in Fresno. I asked them to look up the interest. My instructions were to pay the interest and the difference by check and that Mr. Hart would take care of it when I came back. It was the interest on those bonds and \$300.00 that was lacking of the \$28,300.00. I got the bonds and returned to Merced and saw J. B. Hart at the Farmers & Merchants National Bank. He asked if everything went all right. I told him they expressed themselves as pleased at his being able to take them up. He said nothing in particular only that he was satisfied with the transaction. Up to this time Hart had said nothing to me concerning whose bonds they were. After that I again brought the bonds back to Fresno. This was a day or so later and to the same bank and under instructions from Hart who said, 'We are not able to carry them and I want you to take the bonds back again. I have had additional drafts on us that requires us to get more money.' That is all I remember of, he simply instructed me to go back and return the bonds and get the money. I received the bonds in a package done up. It was wrapped and sealed if I remember correctly. That was only one or two days after I returned for the bonds there. After I got the bonds I put them thru the same bank in Fresno, delivered them to the First National Bank in Fresno and received a draft for them and returned to Merced and then received this draft which you now show me. I brought the bonds down first in March and then I came later and took these bonds back to Merced, then one or two days later I brought the bonds back again. I sold the bonds to the Bank in Fresno and delivered them there twice. The last draft which I received I took to

(Testimony of E. L. R. Trimble.)

Merced and delivered it to Mr. Hart. He was then in the Farmers & Merchants National Bank." It was here stipulated that the draft referred to by the witness was put thru the usual channels and collected by the Farmers & Merchants National Bank and placed to its credit with its correspondent bank in San Francisco. The witness continuing: "I had nothing more to do with these bonds. The last I saw of them they were delivered to the First National Bank in Fresno."

CROSS EXAMINATION.

"The bonds were sold at \$28,300.00 and there was accumulated interest on those bonds from the first of the year and all over and above the \$28,000.00, \$300.00 of that check applies on the bonds and the balance was the interest on the bonds from the first of the year up to that time. Hart instructed me to do this. He told me to give my check for it to pay them the accrued interest. The First National Bank in Fresno took the bonds at their value when I delivered them first and this was the interest that had accumulated on the bonds from the time I had delivered them there first until I took them up. That check did not go thru my account. Hart took it up. He took care of that. I do not know that that was taken up by Hart. I do not know whether it was charged against the Farmers & Merchants Bank." At this juncture it was stipulated that Mr. Landram's check was subsequently charged to the account of J. B. Hart.

TESTIMONY OF E. L. R. TRIMBLE.

E. L. R. Trimble, a witness called on behalf of plaintiff, being first duly sworn, testified as follows: "I have been connected with the First National Bank in Fresno

(Testimony of E. L. R. Trimble.)

since 1920, first as Assistant Cashier and the last year and a half as Cashier. I know N. D. Vaughn. He was employed in the same bank in 1923 and continuously up to the fore part of 1927 as Cashier. In March of 1926 I was Assistant Cashier. I met J. B. Hart once. I had no dealings with Mr. Hart at all. Mr. Vaughn turned the transaction concerning the bonds over to me and I handled it. This was on March 26, 1926. This date is the one shown on our bond warrants and securities original entries in our general ledger which entries are as follows: March 26, various bonds, irrigation district and street improvement bonds \$28,300.00, we charged our bond warrant and securities account on that date with that amount. The bonds are listed more definitely in the regular bond ledger. Other entries on our bank record from which I am reading show that on May 12, 1926 The Farmers & Merchants National Bank of Merced purchased these bonds from us on the face amount of \$28,300.00. That entry is as follows: May 12, Santa Monica and Turlock Irrigation bonds \$28,300.00. I handled the transaction. I delivered the bonds back to the representative of the Farmers & Merchants National Bank—W. E. Landram. In March, 1926 I handled the transaction in accepting the bonds and making the payment. I dealt with W. E. Landram. He did not say anything particular to me as I remember, turned the bonds over to me and I gave him a draft on San Francisco in payment of them. Mr. Vaughn had turned the matter over to me to handle. Mr. Landram was present when this was done. He came in as I remember it and spoke to Mr. Vaughn and Mr. Vaughn told me to handle the transaction. He told me we were

(Testimony of E. L. R. Trimble.)

going to purchase the bonds and pay for them at par value. Well, as I remember it he (Vaughn) said that we were going to purchase these bonds from the Farmers & Merchants National Bank of Merced and for me to take them and handle them in the usual way, debit our bond and warrant securities account and give Mr. Landram a check for the proceeds, that is a draft. I drew the draft myself, made it payable to the Farmers & Merchants National Bank of Merced. Landram turned the bonds over and said they wanted a San Francisco draft for them. We kept a bond register which identified the particular bonds that we received. These are the bond security ledger pages taken from our general ledger and this gives a history of each particular bond taken from our bond register. These are all tax free bonds and were carried under the caption 'Tax free bonds.' I will now read from our records the entries thereon that have to do with the transactions that are involved in March, 1926: March, 1926 under that head of City of Santa Monica sewer improvement bonds we purchased \$6000.00. They are identified by numbers 21-22-27-28-29-30 of denominations of \$1000. Santa Monica sewer improvement bonds (the witness continuing reading from the record) City of Santa Monica Fire Apparatus bonds numbers 21-22-27-28 and 29, denominations of \$500. each which totaled \$2500.00. City of Santa Monica storm drain improvement bonds numbers 21-22-27 and 28, denominations of \$500. each, total of \$2000.00; City of Santa Monica Bridge Improvement bonds, Nos. 21-22-27-28-29 and 30, denominations of \$500. each, total of \$3000.00; March 26, Turlock Irrigation District bonds Nos. 2057 to 2059, inclusive, and 2279

(Testimony of E. L. R. Trimble.)

to 2283, inclusive, 2498 to 2514, inclusive, 268 to 272, inclusive, 274, 277, 280, 1020, 1021, 1022, 1023 and 1081, these are all in denominations of \$400. each. These Turlock bonds figure out \$14,800.00. Other entries in our records show that on May 12, 1926 these bonds were sold back to Farmers & Merchants Bank. Under date of May 12 our record here shows: Sold \$6000.00 City of Santa Monica Sewer Improvement bonds. That is all of the record with reference to City of Santa Monica Sewer Improvement bonds also City of Santa Monica Fire Apparatus Improvement bonds sold \$2500.00 May 12. On the same date \$2000.00 City of Santa Monica Storm Drain Improvement bonds and on the same date \$3000.00 City of Santa Monica Bridge Improvement bonds and Turlock Irrigation District bonds sold May 12, \$14,800.00. I know of my own knowledge that they were delivered to W. E. Landram. I handled that entirely. On May 13 we purchased some of them back. Well, there was a change. They were not exactly the same bonds, practically all the same but there was a little change. Reading from the entries on our records showing the transaction as of May 13, 1926 there is the following: May 13 City of Santa Monica Sewer Improvement bonds Nos. 27 to 30, inclusive, of \$1000.00 each, total \$4000.00. Those bonds we sold March 15, 1927 to Price, Fair & Co. The next sheet I have before me from our records shows the following entries with reference to these bonds: City of Los Angeles Electric Plant Bond No. 8625 \$1000.00 sold May 20, 1927 for \$1000. to Price, Fair & Co. by the First National Bank in Fresno. The next sheet from which I am reading shows: City of Santa Monica Fire Ap-

(Testimony of E. L. R. Trimble.)

paratus Improvement bonds bought May 13, 1926 Nos. 22-27-28 and 29, denominations of \$500. each, total \$2000.00. Under date of May 23, 1927 the First National Bank in Fresno sold the same to Price, Fair & Co. for \$2000.00. The next page shows purchase by us for \$1000.00 City of Santa Monica Storm Drain Improvement bonds under date of May 13, 1926 Nos. 27 and 28, denominations of \$500.00, total \$1000.00; sold May 23, 1927 by our bank to Price, Fair & Co. for \$1000.00. The entries on the next sheet from our records show purchase May 13, 1926 by us of City of Los Angeles Water Works bonds Nos. 796, 751, 781, denominations of \$1000. each, total \$3000.00, sold March 3, 1927 by us to Price, Fair & Co. Other entries from our records show purchase by us on May 13, 1926 of City of Santa Monica Bridge Improvement bonds Nos. 27 to 30 inclusive, denominations of \$500. each, total \$2000.00 and these were sold March 4, 1927 by us to Price, Fair & Co. for \$2000.00. The next sheet shows purchase on May 13, 1926 by us of Turlock Irrigation District bonds Nos. 2057 to 2059 inclusive, 2279 to 2283, 2498 to 2514 inclusive, 268 to 272 inclusive, 274, 277, 280, 1020, 1021, 1022, 1023 in denominations of \$400. each, total \$14,800; that these were sold April 23, 1927 by us to Price, Fair & Co. for \$14,830. But besides these records we have a record from our general ledger. Those entries are as follows: Under date of April 23, 1927 Turlock Irrigation District the account has been credited \$14,830.00. These were the bonds referred to in the bond register and on March 4, 1927 City of Los Angeles \$3000.00. The account has been credited with this amount. On the same date City of Santa Monica

(Testimony of H. A. Williams.)

account was credited with \$2000.00. These bonds are the ones described in our bond register. The next entry May 24, 1927 City of Santa Monica \$1000.00 account has been credited with this amount. May 24, 1927 City of Santa Monica \$2000.00 and the account has been credited with this amount. May 24, 1927 City of Los Angeles Electric Plant \$1000.00 and the account was credited with this amount. Under date of May 24, 1927 City of Santa Monica \$4000.00 account has been credited with this amount. All the bonds that I have last read are the bonds that are referred to in our bond register from which I read a short while ago. These bonds were all payable to bearer—all bearer bonds. At the time I handled these bonds to purchase them during the time we owned them that is, up to about September 25, 1926 I did not know and no one connected with our bank knew so far as I can say that these bonds were claimed by Merced Security Savings Bank of Merced.

CROSS EXAMINATION

There was some correspondence between the plaintiff in this action with our bank concerning these bonds. One letter was from Oakland after we had disposed of them, I cannot remember the exact date of it. We furnished the plaintiff photographic copies of the drafts and matters of that kind in connection with them. The correspondence between us and the Bank of Italy is in our files.

TESTIMONY OF H. A. WILLIAMS

H. A. Williams, a witness called on behalf of plaintiff, after being duly sworn, testified as follows: "I have been engaged in banking for about twenty-five years. At the

(Testimony of H. A. Williams.)

present time I am connected with the First National Bank in Fresno as President and have been such for approximately five years. I knew J. B. Hart in his life time. I recall seeing him in the early part of 1926 in the First National Bank in Fresno concerning certain bonds. The transaction between him and me was as follows: Mr. Hart's bank carried an account with us. He called at the bank at this time—I forget the date—and advised us that their reserves were running low and said they had a pretty good bond account and that it looked like they would have to sell some of their bonds and he wanted to know if we would take them. He figured that in a short time their deposits would again develop and they would be able to re-purchase the bonds; if convenient for us he would like to have us keep this particular batch of bonds intact. I believe that was about all that he said and I said that we were agreeable to taking them. The bank referred to by Mr. Hart was Farmers & Merchants National Bank of Merced. I knew that he was connected with it. I knew that afterwards the bonds came in and were paid for. The details of them I know nothing about. W. E. Landram, the Vice-president of Farmers & Merchants National Bank of Merced brought them in. I had no intimation up to the time of the death of Mr. Hart that these bonds were not the bonds of Farmers & Merchants National Bank or that they were claimed by Merced Security Savings Bank of Merced.

CROSS EXAMINATION.

I had a conversation with Mr. Gallaher and told him that all the information we had of the transaction was available to either and both sides of this case and I as-

(Testimony of F. W. Henderson.)

sured Mr. Gallaher that he could get all the information at any time. The interview I had with Mr. Hart I believe Mr. Vaughn was also present, I think there were the three of us. We paid the face value for the bonds as our account shows. This transaction about the bonds was not simply a holding of those bonds instead of a purchase of them. The transaction was never so construed by us. When Mr. Hart and I talked about this prospective sale of bonds the thing that impressed me particularly was that we agreed to keep this block of bonds intact, if it were not necessary to use them, with the definite statement on Hart's part that as soon as there were funds he expected to take them up and would like to take the same block of bonds. He wanted to dispose of a certain block of bonds and of course we would always before we closed a transaction cover the price." At this juncture the plaintiff rested.

TESTIMONY OF F. W. HENDERSON.

F. W. Henderson was called as a witness on behalf of defendants and after being duly sworn, testified as follows: I live in Merced and know the Merced Security Savings Bank. The relation of attorney and client with that bank extended over a period of probably six or eight years. It was in the nature of an employment covering special services. There was no retainer of any kind. As work was assigned to me I did the work. I worked for them off and on up to the time that the bank was transferred to Bank of Italy, plaintiff in this action. I had nothing to do with the sale and transfer of that bank. After the Bank of Italy took over the Merced Security Savings Bank I have done some work for it. It always

(Testimony of F. W. Henderson.)

had other attorneys. There was no retainer. As I was requested to do work I exercised my own judgment. If I wanted to take up the matter I did so and if not I passed it up. The relation of attorney and client between me and the Bank of Italy with reference to this particular case commenced at the time of the filing of the complaint or shortly before that. I am now City Attorney of Merced. It is a city of the sixth class. I have been in that position somewhere about twenty-two to twenty-four years. I have been conversant with the transactions involving this bond issue. I prepared the Resolution which you showed me, passed by the Board of Trustees of the City of Merced. The signature at the bottom is that of O. A. Turner, Treasurer of the City of Merced." The same was introduced and admitted in evidence and marked Defendant's Exhibit A. "In pursuance of this resolution a suit was brought by the City of Merced against Fidelity and Deposit Company of Maryland, a corporation, and Etta Minerva Hart and George Eganhoff, administrators of the estate of Joseph Byron Hart, also known as J. B. Hart, deceased. I prepared the complaint in that action. The paper that you showed me is a copy of that complaint. At that time J. D. Wood was President of the Board of Trustees." The instrument was offered in evidence and was objected to by plaintiff on the ground that it was incompetent, irrelevant and immaterial and was a matter not involved in this action. The objection was overruled, exception was taken by the plaintiff and the instrument was introduced as Defendant's Exhibit B. The witness was next shown a letter containing a copy of a resolution of the Board of Trustees of the City of Merced

(Testimony of F. W. Henderson.)

written by F. M. Ostrander to Mr. Hilliard, Receiver, he being the Receiver's local attorney, and was offered in evidence. Objection was made to the same by plaintiff on the ground that it was incompetent, irrelevant and immaterial and a matter between parties other than those concerned with the instant action. The objection was overruled and the plaintiff noted an exception. Same was introduced in evidence and marked Defendant's Exhibit C. "So far as that case was concerned it was dismissed. The Fidelity and Deposit Company of Maryland paid to the City of Merced \$11,000.00 in cash and subsequent to that time the Bank of Italy paid to the City of Merced the amount that is mentioned in this letter which includes interest, in all \$15,047.02. Those payments were made on account of the suit that you have spoken of here that is referred to and also on account of the suit that the City of Merced brought against the Merced Security Savings Bank and which suit involved the balance of the deposit that had been made by J. B. Hart as Treasurer with the Merced Security Savings Bank. This compromise was devised for the purpose of settling both suits referred to and also suits were brought by Merced Security Savings Bank against the City of Merced which involved the bonds in question. The attorneys for the bank were Fred Wood and James F. Peck. I had nothing to do with the bringing of that suit. As soon as it developed that there was adverse interests between the bank and the city I immediately notified the bank that my first duty was to the city and from that time on I acted for the city and Fred Wood and James F. Peck represented the bank until it was taken over by the plaintiff and then Ferrari and

(Testimony of F. W. Henderson.)

Posner were substituted for Wood and Peck. The city of Merced brought an action against the Merced Security Savings Bank to recover from it that part of the \$25,000.00 deposited that had not theretofore been repaid. There were four suits in all. The suit brought by the City of Merced against Merced Security Savings Bank was for the balance of the deposit. The complaint filed contained no allegation about the return of bonds which had been put up as security for the deposit. The correspondence which I have here will show just what the final disposition of the litigation was. This is a letter to Louis Ferrari from the bonding company formally closing the transaction, and this is a letter from Mr. Stevick of the bonding company to me."

Mr. GALLAHER: I think that I will introduce them both in evidence.

MR. HENDERSON: We object on the ground that the same are incompetent, irrelevant and immaterial.

THE COURT: Objection overruled. Mr. Henderson's objection and the two letters are introduced and are marked Defendant's Exhibit E and the following letter was read into the record:

"August 22, 1927.

Mr. F. W. Henderson, Attorney, City of Merced, Merced, California.

Dear Sir: In re J. B. Hart, City Treasurer. 3,080,182-A

I hand you herewith draft for \$11,000.00 payment on account of the bond of J. B. Hart, City Treasurer, as per my letter of August 12. Yours very truly, Guy Leroy Stevick, Vice-president Fidelity and Deposit Company of Maryland."

(Testimony of W. C. Freeland.)

(The witness continuing) "All of these matters for the city were handled by me rather than any of its other officers." This letter, dated August 16, 1927 from Fidelity and Deposit Company was received in evidence, marked Defendant's Exhibit H, subject to the general objection heretofore stated and to the exception noted.

(The witness continuing) In connection with this matter I desire to produce as a part of the transaction and in connection with the litigation referred to the demand upon O. A. Turner, as Treasurer made by Merced Security Savings Bank for the bonds involved in this suit. When the demand was presented to the Board of Trustees by the bank, the Board rejected the demand and denied the request. All of these actions that you have referred to (four in number) were dismissed on the consummation of the settlement between the various parties.

TESTIMONY OF W. C. FREELAND.

W. C. Freeland, a witness called on behalf of defendants, being duly sworn, testified as follows: "I am a public accountant of the firm of Burdick & Freeland of Fresno. Prior to that I was in the banking business. I am acquainted with the manner of bookkeeping in banks. I was connected with the First National Bank of Selma and the Selma Savings Bank for 31 years, lacking one month, beginning as a Clerk and all around roustabout, and gradually worked up as business increased, and finally became the presiding officer, passing through the various stages of Clerk, Bookkeeper, Assistant-cashier, Cashier and Manager. I was Manager of the bank for probably 14 years. I made an examination of the books of Farmers

(Testimony of W. C. Freeland.)

& Merchants National Bank of Merced for the purpose of determining the book showing and the actual result of the books showing the transaction between J. B. Hart in whatever capacity he acted in connection with the bonds that I have heard discussed in this suit. I have been able to trace this transaction so as to determine whether the Farmers & Merchants National Bank of Merced received any money or anything of value out of the transaction with reference to these bonds.”

Q. From examination of those books and accounts I will ask you whether or not The Farmers & Merchants National Bank did receive or retain anything out of that transaction.

MR. HENDERSON: I object to the question on the ground that it is incompetent, irrelevant and immaterial. This is a matter of whether the Merced Security Savings Bank, the predecessor in interest of the plaintiff, sustained any loss by reason of this transaction rather than whether or not the party who was guilty of the conversion sustained a loss or received any benefit.

THE COURT: Overruled. I suppose you mean financial benefit?

MR. GALLAHER: Yes.

MR. HENDERSON: Exception.

A. It did not.

The witness continuing: “I examined the account of the City of Merced in the defendant bank during the period preceding December 31, 1925. The city’s money was then kept in the name of J. B. Hart, Treasurer of the City of Merced.”

(Testimony of W. C. Freeland.)

Q. Were you able to determine from that examination of the account whether or not moneys of the City of Merced had been taken from that account by Mr. Hart and appropriated or converted by him prior to the 31st day of December, 1925? A. Yes.

Q. What did you find in that regard?

Mr. Henderson objected to the question as incompetent, irrelevant and immaterial and not presenting any of the issues involved in this action.

THE COURT: Overruled. Exception taken by Mr. Henderson.

A. I found three items that I recall now amounting to \$15,000.00 or over in a short period that the city should have received the benefit of and did not.

Q. Now were you able to determine what amount of money was to the credit of the City of Merced on the 11th of February, 1925 in that bank or to the credit of the Treasurer of the City of Merced? A. I was.

Q. What was that amount?

Mr. Henderson objected to the question as incompetent, irrelevant and immaterial. The court overruled the objection and Mr. Henderson noted an exception.

A. The ledger sheet showed a credit of a little over \$75,000.00 on the last day of the year, 1925.

THE COURT: To the credit of whom? A. To the credit of J. B. Hart, Treasurer. We examined the records on April 3rd, April 6th and again on October 15th and 17th, 1928. Hart was, according to the bank ledger sheet chargeable with something over \$75,000.00 of the city money. I went to the city records to see what they disclosed.

(Testimony of W. C. Freeland.)

Q. You can tell the discrepancy, I guess, if there was any? What did you find?

MR. HENDERSON: Objected to as incompetent, irrelevant and immaterial.

THE COURT: Overruled. Mr. Henderson excepted.

A. The city records showed that there should have been altogether a little over \$109,000.00. Now you will need a further explanation to get those figures together if you want to bring that out.

THE COURT: Let me see if I understand. The final deduction from those two would be that there was a shortage in the city fund, the difference between those two amounts?

A. No, not exactly that. The city books showed a balance of a little over \$75,000.00 to his credit in the bank as Treasurer.

THE COURT: Then why was not my hypothesis correct? That the result would be that there was a discrepancy or difference between those two figures? A. Well, that is practically correct but the situation is this: That balance of \$75,000.00 was not correct. This I determined by subsequent entries made within the next day or two. I stated the credit balance to the account of J. B. Hart, Treasurer, in that bank was a little over \$75,000.00; on that same day (December 31, 1925) he had made a deposit of \$45,000.00 in the Bank of Italy at Merced which he had taken out of that account so that would make a difference of that much. Then in addition to that he had deposited \$25,000.00 in the Merced Security Savings Bank on the same day. To pay that particular deposit now he does not give a check on his

(Testimony of W. C. Freeland.)

Treasurer's account but he has used a draft drawn by his bank on the Federal Reserve Bank in San Francisco for \$25,000.00 that the Merced Security Savings Bank received. Then in turn the Merced Security Savings Bank to secure that \$25,000.00 as demanded by the law gives Mr. Hart, the Treasurer, \$28,300.00 in bonds. No transaction and no items were mentioned in the books in the bank books on the 31st day of December that would give that information but two days subsequent on page 2 then he charges the bond account in that bank with the sum of \$28,300.00, increasing the bond account by that much in order to clear that balance and to make a credit for it he credited to the Federal Reserve Bank in San Francisco \$25,000., the exact amount he drew on them two days prior but which he did not credit and that left a balance of \$3300.00 still unaccounted for that he takes and puts into his own personal account, making out a deposit ticket in his own hand writing. Then that takes care of the transaction up to that point. Then as far as we can ascertain by the books nothing is done with reference to those bonds. The books show no transaction whatever with reference to them. On March 26, 1926 these bonds were taken to the First National Bank in Fresno and somehow disposed of. On March 27, 1926 the books (of the Farmers & Merchants National Bank) show that that bank received from the First National Bank of Fresno a draft for \$28,300.00. At least that date is the date on which it was run thru the books of Farmers & Merchants National Bank, then to balance the transaction of the bank receiving the draft the bond account is credited \$28,300.00 which clears the charge made January 2, 1926

(Testimony of W. C. Freeland.)

that put the bond account back in the exact relative position that it was before. Then nothing happened again until May 14, 1926. On that date the American Bank in San Francisco is credited with \$10,000.00 and the Federal Reserve Bank in San Francisco is credited with \$18,000.00 drafts which were drawn several days prior to that according to dates but not entered in the record. Those two items helped to purchase back the bonds from the First National Bank in Fresno and there was a difference of \$521.68 that the record show Mr. Landram gave a check for, \$300.00 of that being principal to make up the \$28,300.00; that check went thru Mr. Landram's personal account. His account was charged that much and he was repaid by a charge in Mr. Hart's own personal account so that in reality J. B. Hart paid that \$521.68 out of his own personal account. There was an entry in Mr. Landram's account with the bank showing the withdrawal of that amount from his account.

We have disposed of that second transaction in which was credited \$10,000. to the American National Bank and \$18,000. entry, the entry being \$10,000. to the American National Bank and \$18,000. to the Federal Reserve Bank, the counter-balancing entry for that was the receipt of a draft for \$27,800. received by the Farmers & Merchants National Bank from the First National Bank in Fresno. That left a difference of \$200. which the books do not show where that came from. No entry was made on the bond account at all. There were two sheets covering the J. B. Hart Treasurer account. They were both kept in the files. Here is the spurious sheet (indicating) and this is the genuine. This sheet, marked for identification De-

(Testimony of H. B. McClelland.)

fendant's Exhibit L-1, is the bank sheet as kept in the bank. This paper marked for identification Defendant's Exhibit L-2 showed the correct balance due the City of Merced. These sheets I received from Colonel Hilliard, the Receiver." At this juncture the witness was withdrawn, and

H. B. McCLELLAND,

a witness called on behalf of defendants, after being duly sworn, testified as follows: "Exhibits L-1 and L-2 which you now show me were delivered by Mr. Hilliard to Mr. Freeland in the Farmers & Merchants National Bank in Merced. I was then an employe in the bank, working under Mr. Hilliard. I knew that these papers were in the bank at that time. Shortly after the bank closed Mr. Hilliard engaged Parker & Manners, public accountants, to go over the books of the bank and J. B. Hart's account. It was while they were there that they found these sheets in what we call the file where full sheets and closed-out accounts were filed. I am referring to both sets. There were no other sheets covering the same period of time showing the account between the City Treasurer and the bank. When the bank was in operation we had ledgers that were in use every day that the bookkeepers were posting on every day. When a sheet fills up, of course, they have to make a new sheet to go on with the account. This full sheet is pulled out and filed in a file for future reference or to keep the account intact. If the account is closed out it is taken out of the ledger. Only the live sheets are kept in the ledger. We kept these full sheets of active accounts in a sort of tin file with three or four

(Testimony of W. C. Freeland.)

drawers in it. The posting during this time with the posting machines was done by two bookkeepers, Henry Hall and J. C. Hart, the latter a son of J. B. Hart. I do not know whether J. B. Hart operated a posting machine.

CROSS EXAMINATION

I knew that the City of Merced accounts were kept in our bank by Mr. Hart during the time embraced in these sheets. They were discovered by Parker & Manners. I was in the bank at the time."

At this juncture W. C. Freeland was recalled on behalf of defendant on direct examination and testified as follows:

W. C. FREELAND

Mr. Hart's account as Treasurer of the City of Merced showed a credit balance of \$75,664.39 on December 31, 1925. At the close of business on December 30, it shows a balance of \$75,664.39; December 29th, \$75,446.39; December 26th, \$78,719.87; December 23rd, \$78,739.87. These figures are taken from Exhibit L-1 which shows the Hart account with the bank. From Exhibit L-2 which shows the account between Hart and the City of Merced it appears that Hart's balance December 31, 1925 was \$39,038.80; December 30th, \$109,038.80; December 22nd, \$108,820.80; December 16th, \$109,915.29; December 14th, \$111,690.23."

THE COURT: I am going to ask a question which may be objectionable, gentlemen, but if it is I do not want you to waive any objections but I am going to ask it anyhow. What would be the object, in your opinion, of Mr. Hart keeping these two sets of ledger accounts purporting

(Testimony of W. C. Freeland.)

to show the status of his account with the Treasurer in the Farmers & Merchants National Bank?

A. He wanted to show at all times—he wanted to have a sheet he could show at all times to whoever might inquire what should have been the true state of the City of Merced finances.

Q. And he wanted to have another sheet to show the actual condition?

A. No, just the other way around.

Q. It is the other way around the way you look at it?

A. Yes.

Q. I cannot quite get the idea of a man who was trying to conceal something keeping a record to disclose it.

A. The bank sheet itself would disclose that—L-1 as we call it, but the other sheet shows the actual conditions as they should have been between him as Treasurer and the City of Merced.

THE COURT: Both of these sheets were kept in the bank? A. Yes, but they needed one to prove up the other bank records and L-1 was the one that proved up with the other bank records and not the other one. If a city official went into the bank and asked the Treasurer to refer to the sheet showing the city's account he would exhibit L-2 and if a national bank examiner went into the bank to discover the true condition he would see only one sheet and he would prove up with L-1. L-2 shows the true condition of J. B. Hart's account as Treasurer of the City of Merced with the city. If a national bank examiner was shown L-1 in my opinion he would take it at its face value as being a correct copy of the ledger. If he had gotten ahold of L-2 he would immediately discover that

(Testimony of Henry P. Hilliard.)

there was a fabrication there in making his comparison with L-1. I went to the city records took a list of the deposits which should have been made during the months of October, November and December, 1925 to see how they harmonized. I found all the credits in L-1 with the exception of three deposits amounting to something over \$15,000. which had not been credited in L-1 to J. B. Hart, Treasurer, in L-2. They were in agreement as to amounts, slightly different sometimes as to date. Two fairly large size items we tried to check up but could not find where they went. Another item, something over \$7000., that the City of Merced or J. B. Hart account should have had credit for was placed directly in his personal account. I determined from the examination of these accounts that Hart had appropriated to his own use of the funds of the city on or about December 31, 1925, \$34,000.00.

HENRY P. HILLIARD,

a witness called on behalf of defendants, testified as follows:

I am the Receiver of the Farmers & Merchants National Bank, now in the process of liquidation, and with the Bank a defendant in this case.

It is here stipulated between counsel that there are approximately 2500 depositors of the defunct bank, that there has already been an assessment made and collected of \$100. a share on the stock liability, and that the debts of the corporation will be paid to the extent of about fifty cents on the dollar, and that there will be nothing to distribute to officers or stockholders.

(Testimony of E. L. Trimble.)

E. L. TRIMBLE,

a witness produced by plaintiff, recalled for further cross-examination, testified as follows:

The letter of which you (Mr. Gallaher) now shows you is the letter upon which I gave the plaintiff the information transmitted by letter to Mr. Hart concerning the bond transactions with our Bank.

The letter was introduced in evidence by defendants and marked Defendants' Exhibit "K".

Our Bank did transmit interest coupons detached from these various bonds to the Farmers & Merchants National Bank at Merced. This was in conformity to a letter received from the Bank signed by Mr. Hart, its President.

Vaughn before coming to the First National Bank in Fresno in September, 1923, was a National Bank Examiner. I knew that the First National Bank in Fresno while Vaughn was cashier was making loans to J. B. Hart. I knew that the matter of the making of the loan was discussed with some one else in the Bank other than Mr. Vaughn. I don't remember who it was. I believe Mr. Hart had a statement of his resources and liabilities on file in this Bank and this loan was made on the strength of that statement. It proved to be a bad loan afterwards and it was written off. I think it was for \$2500. I don't recall about when it was that the loan was made.

A RE-DIRECT EXAMINATION.

The Farmers & Merchants National Bank of Merced carried a credit account with us. It was never a very large account and balance would run around perhaps \$15,000. I am not able to say what the condition of that account was at the time the bonds were sold to us. I

(Testimony of E. L. Trimble.)

attended personally to the clipping of the coupons from the bonds.

“The Court: How did you come to do that, what arrangements were made as to that, if any?”

“A. The only way that I understood it was that we took these bonds in at the par value and never figured the accrued interest at the time it was put on the books, and when we clipped the coupons Mr. Hart as President of the Bank said he would pay us the interest on them and he would like to have the coupons; that was my understanding.”

In return for the coupons our Bank received from Merced a check for an amount of money. What it was I don't remember. It would be the proportionate part of the interest from the time that we received the bonds in the First National Bank in Fresno to the last due date of the interest payments. There was no account ever taken in our Bank of the accrued interest due on these bonds up to May 11, 1926. I don't know why it was not calculated at the time of the transfer any more than Mr. Vaughn said we purchased these bonds at par value and we paid the par value for the bonds. The par value of these bonds was practically the market value.

“The Court: I could not quite get from Mr. Trimble the reason for a Bank sending the coupons to Merced if the transaction was an account and account sale.”

“A. Well, that was my understanding of it. There was a letter transmitted to Mr. Hart to the Farmers & Merchants National Bank, one that I endeavored to find this morning, stating that these bonds were an outright purchase, but Mr. Hart had suggested that if we could

(Testimony of E. L. Trimble.)

hold them intact and if they were all right for our files, were the kind of bonds we wanted, I might want to re-purchase them, but our letter to the Farmers & Merchants Bank was we were buying these bonds outright and there is a copy of that letter in our files. I know that, because I saw the letter. After Hart committed suicide Vaughn got the correspondence out and took the matter up with our attorney to see that they were bearer bonds, and we had purchased them as bearer bonds and that we were absolutely clear in the transaction and the letter was on his desk. I have been endeavoring to locate that letter with the other. So far I have been unable to do so, but I know there was a letter transmitted to the Farmers & Merchants National Bank setting out that these bonds were purchased."

Mr. Gallaher continued with the cross-examination when the witness was recalled.

Three letters were produced by him and were introduced in evidence by defendants under the objection of plaintiff that they were incompetent, irrelevant and immaterial, and an exception being taken to the order of the Court admitting them, and they were marked Defendants' Exhibit "M."

The witness also produced a note for \$2500., dated July 27, 1926, signed by J. B. Hart, which was a renewal note of the loan originally made January 19, 1926, in the sum of \$3500., upon which \$1000. had been paid. These with the attached financial statement of Hart were admitted in evidence and marked Defendants' Exhibit "N."

(Testimony of W. C. Freeland.)

CROSS-EXAMINATION OF W. C. FREELAND.

We did not find any withdrawals from Hart's treasurer's account Exhibit L-1 which should not have been made. We found a number of deposits which he made in the account which should not have been there. They came from his personal account at times. Some of the deposits we could not trace. Other deposits which we traced came direct from his personal account to build up the balance belonging to the City in order to pay warrants as they came in. I found also that he withdrew from the City account, as shown by L-1 funds to replenish his own personal account in the Farmers & Merchants National Bank. I could not say from my examination how much that amounted to in the year 1925. There were so many transactions in which he would attempt to repay some of the money in order to pay City warrants that one would have to make an exact examination and have exact date in order to tell how things stood there. When the proceeds of the drafts that were delivered to the Farmers & Merchants National Bank by the First National Bank in Fresno were credited to the account of the Farmers & Merchants National Bank in its correspondents Banks in San Francisco, that in my opinion would constitute an asset of the Farmers & Merchants National Bank. Those drafts were entered to the credit of the Farmers & Merchants National Bank in its correspondents Banks in San Francisco. Those credits I would recognize as assets of the Farmers & Merchants National Bank.

“MR. PEART: I move to strike out the last answer and object to the question. It is simply a question of what the books show. Apparently it is his opinion that is re-

(Testimony of Henry P. Hilliard—Guy Leroy Stevick.)
quested as to whether this witness would recognize this item as entered.”

“THE COURT: I don’t think it is his opinion. I think perhaps it is a misnomer. I think that instead of assets it would be a credit. He did find something in the beginning to show that to be a credit of the Farmers & Merchant National Bank.”

“A. Yes sir.”

“THE COURT: Motion is denied.”

“MR. PEART: Exception.”

HENRY P. HILLIARD

recalled on behalf of defendants.

When I took charge of the assets of the Farmers & Merchants National Bank of Merced I did not find any account between the Bank and N. D. Vaughn. He had a note there. The amount due thereon at the time the Bank closed was \$3500. Subsequently I collected it.

“MR. PEART: We now offer these accounts L-1 and L-2, previously marked for identification in evidence.”

“MR. HENDERSON: We object on the ground that they are incompetent, irrelevant and immaterial.”

“THE COURT: Overruled.”

“MR. HENDERSON: Exception.”

Whereupon the accounts were admitted in evidence and marked Exhibits “L-1” and “L-2.”

GUY LEROY STEVICK.

After the order submitting the case upon briefs, made by said Court, upon the conclusion of the production of testimony by the parties to said action on October 25,

(Testimony of Guy Leroy Stevick.)

1928, upon motion of defendants, the Court made an order re-opening the case for the purpose of taking the deposition of Guy Leroy Stevick in San Francisco, California, and of the Manager of the branch bank of plaintiff corporation located in the City of Merced, County of Merced, State of California, and that pursuant to said last mentioned amendment the following stipulation was made and entered into by and between counsel representing the respective parties in the above case, and was subsequently filed with the records of the above case:

“IT IS HEREBY STIPULATED by and between the plaintiff in the above-entitled action and the defendants therein that, pursuant to letter of Guy Leroy Stevick, Vice-President of the Fidelity & Deposit Company of Maryland, to Mr. Louis Ferrari, Vice-President of the Bank of Italy at San Francisco, the said plaintiff received from the said Bonding Company, pursuant to paragraph III of said letter, which is defendants’ Exhibit E in the above case, the sum of \$15,047.02; and

IT IS FURTHER STIPULATED that this stipulation may be filed in the above-entitled action and with the deposition of Guy Leroy Stevick, heretofore taken as ordered by said Court, considered by the Court in arriving at its judgment in said action.”

and by stipulation of the parties the deposition was subsequently taken July 11, 1929. At that time he was called as a witness on behalf of defendants, and after being duly sworn, testified as follows:

I am the Vice-President of Fidelity and Deposit Company of Maryland and have been such for about 35 years. My Company was on the official bond of J. B. Hart as

(Testimony of Guy Leroy Stevick.)

Treasurer of the City of Merced, California, in the sum of \$40,000. Claims were presented to the Company upon that bond by the City of Merced. I understood that Hart as Treasurer had made a deposit of moneys of the City of Merced with the Merced Security Savings Bank of Merced. Certain actions were brought in relation to that deposit and to the acts of J. B. Hart along in and prior to August 1927. There were two suits, one brought by the City of Merced against us on the bond in which they claimed some \$11,000 defalcations and another item of about \$3,000. on warrants, another item of about \$2500. or \$3000. and another item being the deposit of the City in the Merced Security Savings Bank amounting to about \$15,000. with interest. There was also a suit brought against us by the Bank of Italy as successor of Merced Security Savings Bank for about \$28,000., being the value of certain securities which were alleged to have been delivered by the Savings Bank mentioned to Hart, the Bank of Italy having succeeded to the interest of the Savings Bank in the matter.

I have read the copy of the letter set out on pages 4 & 5 of Mr. Gallaher's affidavit. I wrote that letter. It is correct.

Paragraph 3 thereof reads as follows: "We will pay to you (Bank of Italy) the amount of the City's deposit and interest upon it at the rate agreed to be paid by your Bank (this amount to be paid by you to the City)." I signed that letter as Vice-President of the Company and addressed it to Louis Ferrari as Vice-President of the Bank of Italy. The letter referred to and set out by copy in the affidavit presented to the witness is as follows:

(Testimony of Guy Leroy Stevick.)

“FIDELITY AND DEPOSIT COMPANY
(Letterhead)

August 12, 1927

“Mr. Louis Ferrari,
Vice President,
Bank of Italy,
San Francisco.

In re J. B. HART.

Dear Sir:

I beg to confirm the terms of settlement of claims against us under the above bond, to wit:

1. We will pay to the City of Merced, the sum of \$11,000.

2. We agree to hold the City of Merced harmless from the claim of the Receiver based upon certain warrants aggregating \$3,027.62.

3. We will pay to you the amount of the City's deposit and interest upon it at the rate agreed to be paid by your bank (This amount to be paid by you to the City).

4. We will pay to you further the sum of \$5,500. and will agree also to pay you one-half of any saving which we may make on the claim of the Receiver against the City. It is to be understood, however, that we reserve the right to pay that claim in full, or to make any adjustment we think best.

5. We understand you will at once bring suit against the Receiver of the Farmers & Merchants Bank for the value of the bonds missappropriated by that bank, and that in consideration of the payments made to you you will, if successful, pay to us one-half of the net proceeds of

(Testimony of Guy Leroy Stevick.)

that suit after deducting all costs, expenses and attorneys fees. In case either you or we are reimbursed in full for any loss then the other party shall be entitled to the balance of the net proceeds until it is fully reimbursed.

I am sending a copy of this letter to Mr. Henderson, and *he if* and you advise that this is satisfactory we will make payment forthwith.

Yours very truly,

(signed)

Guy LeRoy Stevick,
Vice-President."

Pursuant to that letter, the Fidelity and Deposit Company of Maryland paid to the Bank of Italy \$15,047.02, being the amount of the deposit of the City of Merced with the Bank, which amount was to be paid over and was paid by the Bank to the City. We also paid the Bank the sum of \$5500., which was an agreed amount in consideration of which the Bank was to do the things referred to in the letter under paragraph 3. The amount of \$15,047.02. included accrued interest in the sum of \$469.57. I received from Mr. Henderson, City Attorney, and from Mr. Wood, President of the Board of Trustees of Merced, a receipt for \$15,047.02, being the balance of the City deposit made by Mr. Hart while he was City Treasurer of said City. I will read it into the record:

"In the Superior Court of the County of Merced, State of California.

City of Merced, a body politic, and corporate, Plaintiff,
against Merced Security Savings Bank of Merced, Defendant.

"Receipt in full settlement of all claims.

(Testimony of Guy Leroy Stevick.)

“This is to acknowledge payment by Bank of Italy National Trust & Savings Association, Successor to the Bank of Italy, which acquired by purchase the property of said defendant, and assumed all obligations owing by it, and particularly the one involved in the above entitled action, the sum of \$15,047.02, being the balance of the said deposit made by J. B. Hart while and as City Treasurer of said City in said defendant Bank of said fund, together with interest upon the daily balance of said deposit at the rate of 2-½% per annum.

“This receipt is executed in conformity to a resolution of the Board of Trustees of the City of Merced, heretofore duly adopted by said Board, empowering the undersigned to execute the same on behalf of the said City, and to accept said amount in settlement of said claim.

“Dated August 23rd, 1927.

“(Signed) J. D. Wood,

“President of the Board of Trustees.

“F. W. Henderson, City Attorney and
Attorney for plaintiff in said action.”

I also received a receipt from the City of Merced for the additional sum of \$11,000. at the same time. The draft for \$15,047.02 was payable to the Bank of Italy. It was paid in accordance with the 3rd paragraph to the Bank, this amount to be paid by the Bank to the City, and it was so paid. The Bank of Italy paid in a single draft which included the two sums, \$15,047.02 and \$5500. There was also paid \$11,000. to the City, I may say, in accordance with the 2nd paragraph of my letter. We have also since paid to the City the amount of the claim referred to in that section. The receipt which I have read

(Testimony of Guy Leroy Stevick.)

into the record for the sum of \$15,047.02 from the Bank of Italy National Association was signed by Mr. Henderson in compliance with the quoted section of paragraph 3 of my letter and contained in brackets which I read. "This amount to be paid by you to the City?" It was thought that it would be clearer to have that amount passed through the Bank to the City, rather than to have us pay it directly to the City, and it was so paid. By making the payment in that way, the books of the Bank showed that the account was balanced. Upon that payment being made by my company the two actions in which it was a party were dismissed and also in accordance with that another suit was begun by the Bank of Italy on behalf of it and of our company against the Farmers & Merchants National Bank and its Receiver. In that action this deposition is now being taken.

CROSS-EXAMINATION

The original deposit of the City of Merced in the Merced Security Savings Bank was \$25,000.00. The amount of that deposit was reduced to the sum of \$14,577.45 to which we added the accrued interest of \$469.57. My company was on Hart's bond to the extent of \$40,000.00. Suit was brought on that bond against my company and one of the items of recovery was that balance of the original deposit, to wit, the sum of \$14,000.00. The city claimed we were liable for the balance of that deposit in the bank on account of our being on Hart's bond. It also claimed \$11,000.00 on another account from us. That suit was adjusted in that settlement. We paid \$11,000.00 to the city and then drew a check for \$20,000.00 plus in favor of the Bank of Italy to pay the amount of the deposit to

(Testimony of Guy Leroy Stevick.)

the city. We thereupon filed a claim against the estate of J. B. Hart, deceased, which I understand has been allowed and has never been paid. The total of the suits brought by the city and by the Bank of Italy exceeded the amount of our bond and we pleaded the defense against the suit by the bank on the ground that it had no right of action under our bond but there was a dispute on the legal question involved in that defense. The adjustment which I made tried to take care of all legal obligations to the city on our bond and left the Bank of Italy to bring suit against the Farmers & Merchants National Bank for the misappropriation of the bonds which had been deposited by the Merced Security Savings Bank with Hart and provided for the division of the proceeds of that suit between the Bank of Italy and ourselves up until either one of us was satisfied with respect to our claims.

RE-DIRECT EXAMINATION.

We forwarded this draft to the Bank of Italy about August 23rd, 1927. That is the date on which I reported the drawing of this draft to the home office of the company.

The foregoing was all of the evidence in the case, other than the exhibits that have been identified hereinbefore by reference to numbers and letters and which have been set out, that to the extent that the same are material. The testimony of the witnesses as set out herein gives the material portions. The plaintiff and defendants both rested and the plaintiff thereupon made the following motion; that judgment in said action be entered in favor of plaintiff and against defendants for the sum of \$28,000. and for its costs of suit herein, and that said Court adjudge

(Testimony of Guy Leroy Stevick.)

and decree that the claim of said plaintiff against defendant is a valid claim and direct that said Receiver certify the same as a valid claim against defendants to the Comptroller of Currency of the United States, to be paid by him in the due course of the liquidation of said Bank, together with its costs of suit herein incurred, and the said plaintiff thereupon reserved an exception to any judgment made by said Court not in accordance with said motion; thereupon the cause was submitted to the Court for decision upon briefs thereafter to be filed. Subsequently the Court in the absence of the parties filed a memorandum opinion in the case and therein ordered that findings and judgment be prepared by counsel for the plaintiff and that plaintiff have judgment against defendants according to the prayer of its complaint less the sum of \$5500. and an additional sum of \$15,047.02, for which amounts credit must be given in such findings and judgment; that thereafter counsel for plaintiff reserved its exception to the said order and the findings and judgment so to be prepared, did prepare the proposed findings of fact and judgment and did in open Court on January 18, 1930, move the Court for judgment in favor of plaintiff, establishing its claim as a preferred claim against said defendants for the sum of \$27,800., the value of the bonds alleged to have been converted, which motion was denied by said Court, an exception thereto taken by plaintiff, and thereafterwards on January 29th, 1930, findings and judgment were adopted, signed and filed by said Court, which findings and judgment are for judgment against defendants in favor of plaintiff for the sum of \$6789.74 and costs of suit.

The Court: "The record may show that either party may have an exception reserved on the record to every adverse ruling made now or hereafter."

Come now the plaintiff, and within the time allowed by law, presents this, its Bill of Exceptions herein, and prays that the same may be settled and allowed.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

IT IS STIPULATED that the foregoing Bill of Exceptions may be settled and approved, the same having been corrected in accordance with the agreement of said parties.

Louis Ferrari,
J. J. Posner
F. W. Henderson
Attorneys for Plaintiff.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

The above and foregoing statement is hereby approved and settled.

Dated, March 3rd, 1930.

Paul J. McCormick
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA—
NORTHERN DIVISION.

BANK OF ITALY NATIONAL :
TRUST AND SAVINGS ASSO-
CIATION, a national banking as-
sociation,

Plaintiff, : No. 367-J. Civil

vs.

AFFIDAVIT OF
MAILING BILL
OF EXCEPTIONS

THE FARMERS AND MER- :
CHANTS NATIONAL BANK :
OF MERCED, a national banking :
association, and HENRY P. HIL- :
LJARD, as Receiver thereof, :

Defendants.

STATE OF CALIFORNIA, :
: ss.
COUNTY OF MERCED. :

Ellen F. Hughes, being duly sworn, deposes and says:
That she is a clerk in the office of F. W. Henderson, at-
torney at law, attorney for plaintiff in the above entitled
action; that said F. W. Henderson resides in and has his
office in the City of Merced, County of Merced, State of
California; that Messrs. Hartley F. Peart and Gallaher
& Jertberg are the attorneys of record for the above
named defendants in said cause; that the said Hartley F.
Peart has his offices in the City and County of San Fran-
cisco, State of California; that Gallaher & Jertberg have
their offices in the City of Fresno, County of Fresno, State

of California and none of said attorneys for defendants reside in or have their offices in the County of Merced; that in each of said three places there is a United States Postoffice and between said City of Merced and said City and County of San Francisco, and between said city of Merced and said City of Fresno there is a regular daily communication by mail;

That on the 6th day of February, 1930 deponent served the annexed bill of exceptions in said action on said attorneys for defendants by depositing a true and correct copy of said bill of exceptions on said day in the postoffice at said City of Merced, properly enclosed in an envelope, addressed to said Gallaher & Jertberg, attorneys at law, Brix Building, Fresno, California, their said place of business, and prepaid the postage thereon.

Ellen F. Hughes

Subscribed and sworn to before me this 6th day of February, 1930.

[Seal]

F. W. Henderson

Notary Public in and for the County of Merced,
State of California.

[Endorsed]: Lodged Feb. 7, 1930. R. S. Zimmerman,
Clerk By Edmund L. Smith, Deputy Clerk.

Filed Mar. 3, 1930. R. S. Zimmerman Clerk By Louis
J. Somers, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

PETITION FOR APPEAL.

To the Honorable PAUL J. McCORMICK, District
Judge:

The above named plaintiff, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 29th day of Jan., 1930, does hereby appeal from said decree to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and it does pray that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided, and your petitioner further prays that the proper orders relating to the required security to be required of it be made.

Dated, February 7th, 1930.

Louis Ferrari

J. J. Posner

F. W. Henderson

Attorneys for Plaintiff and Appellant.

Appeal as prayed for is allowed and bond thereon fixed
in the amount of \$500.00

Paul J. McCormick

U. S. DISTRICT JUDGE

[Endorsed]: Filed Feb 7, 1930. R. S. Zimmerman
Clerk By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in said cause and files the following assignment of errors upon which it will rely on its prosecution of appeal in the above-entitled action from a judgment entered by said Court on the 28th day of January, 1930:

1. The Court erred in overruling plaintiff's motion for judgment in its favor against defendants in accordance with the prayer of its complaint and for the amount mentioned therein.

2. The Court erred in crediting defendants with the amounts paid by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to the plaintiff, and reducing the amount of the judgment to which plaintiff was entitled and for which it moved by those amounts.

3. The Court erred in ordering judgment in favor of plaintiff and against defendants for no more than the sum of \$6789.74.

4. The Court erred in adopting and signing the proposed findings of fact in the above cause so far as the same reduced the amount to which plaintiff was entitled and credited defendants with the payments made by FIDELITY AND DEPOSIT COMPANY OF MARYLAND to plaintiff.

WHEREFORE, plaintiff prays that the aforesaid judgment in the United States District Court be modified and changed, so that judgment be rendered and entered in favor of plaintiff against defendants for the full amount

prayed for, to-wit, \$27,800. and costs of suit, and that the same be established as a preferred claim and paid in full by said defendants in the process of liquidation of said defendant Bank.

Dated, February 6th, 1930.

Louis Ferrari,

J. J. Posner

F. W. Henderson.

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 7, 1930. R. S. Zimmerman
Clerk. By Edmund L. Smith Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J. Civil.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, as surety, are held and firmly bound unto the defendants in the above-entitled cause in the sum of FIVE HUNDRED AND 00/100 - - - - - DOLLARS (\$500.00 - -) to be paid to said defendants, its successor or assigns, for which payment well and truly to be made the undersigned bind ourselves, and each of our successors and assigns, jointly and severally, by *the* these presents.

SEALED with our seals this 10th day of FEBRUARY 1930.

WHEREAS, the above-named plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to correct the judgment of the District Court of the United States, in and for the Southern District of California, Northern Division, heretofore made, given and rendered in the above-entitled cause in favor of plaintiff and against said defendants.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute this said appeal to effect and answer all damages and costs if it fails to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

BANK OF ITALY NATIONAL TRUST AND
SAVINGS ASSOCIATION,

By B. Fancher

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

By J. R. Cornett

[Seal]

Its Attorney-in-fact.

STATE OF CALIFORNIA,)
County of Merced.)

On this 10th day of February, 1930, before me, the undersigned, a NOTARY PUBLIC, in and for the County of Merced, State of California, duly commissioned and sworn, personally appeared J. R. CORNETT, known to me to be the duly authorized attorney-in-fact of FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, and the same person whose name is sub-

scribed to the within instrument as the attorney-in-fact of said Company, and the said J. R. CORNETT acknowledged to me that he subscribed the name of FIDELITY AND DEPOSIT COMPANY OF MARYLAND thereto as principal, and his own name as attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal]

Ellen F. Hughes

NOTARY PUBLIC, in and for the County of
Merced, State of California.

The within Bond approved February 12th, 1930.

Paul J. McCormick

JUDGE.

[Endorsed]: Filed Feb. 12, 1930 R. S. Zimmerman
Clerk By M. L. Gaines Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 357-J.

STIPULATION.

IT IS HEREBY STIPULATED that all of the original exhibits introduced and filed in said action upon the trial thereof, in the District Court of the United States, in and for the Southern District of California, Northern Division, may be transmitted by the Clerk of said Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that the same may be used by said United States Circuit Court of Appeals for all purposes which the same might have been used had

they been incorporated in and made a part of the Bill of Exceptions and also by the respective parties in the preparation of their briefs and upon argument upon appeal.

Dated, March 3rd, 1930.

Louis Ferrari,
J. J. Posner and
F. W. Henderson,
Attorneys for Appellant.
Hartley F. Peart
Gallaher & Jertberg
Attorneys for Appellees.

[Endorsed]: Filed Mar 13 1930 R. S. Zimmerman,
Clerk. By M. L. Gaines Deputy Clerk

[TITLE OF COURT AND CAUSE.]

Civil No. 357-J

ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS

It appearing to the court that heretofore the parties to the above entitled action have in writing stipulated that all of the original exhibits introduced and filed in said action upon the trial thereof should be transmitted by the Clerk of the said court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for use by the said court upon the appeal taken to it from the judgment of this court in said action, and this court being of the opinion that said original papers should be inspected in said United States Circuit Court of Appeals for the Ninth Circuit upon appeal.

IT IS HEREBY ORDERED that all of said original exhibits be transmitted by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, by United States mail and that the same be entrusted to said Clerk of said court for safe keeping and that upon the final determination of said appeal said original exhibits be returned by him to the Clerk of this court by registered United States mail.

Dated, March 13, 1930.

Wm. P. James

Judge of the District Court of the United States
in and for the Southern District of Cali-
fornia, Northern Division.

[Endorsed]: Filed Mar 13 1930 R. S. Zimmerman,
Clerk By M. L. Gaines Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 357-J Civil.

STIPULATION AND ORDER RE PRINTING
TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective attorneys of record, that in printing the transcript of record on appeal herein, the "Title of Court and Cause" may be used in lieu and stead of the full title, and that the full endorsement of the Clerk of the filing of pleadings, papers and other formal matters may be omitted, and in lieu thereof a statement shall be made that the document is filed, the date thereof and the signature of the Clerk. In

each instance the pleading and document so printed shall be identified by the number in the Court below of this action, to-wit: 357-J. Civil.

Dated: this 10th day of February, 1930.

Louis Ferrari,
J. J. Posner and
F. W. Henderson,
Attorneys for Plaintiff.

Hartley F. Peart
Gallaher & Jertberg
Attorneys for Defendants.

SO ORDERED.

Paul J. McCormick
UNITED STATES DISTRICT JUDGE.

[Endorsed]: Filed Feb. 12, 1930. R. S. Zimmerman
Clerk By M. L. Gaines Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CIVIL No. 357-J

PRAECIPE.

TO THE CLERK OF SAID COURT:

YOU ARE REQUESTED to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Citation on appeal;

2. Complaint;
3. Petition for removal of cause from Superior Court of Merced County to the District Court of the United States for the Southern District of California, Northern Division;
4. Order for removal of cause from said Superior Court;
5. Answer;
6. Written stipulation waiving jury;
7. Motion for judgment;
8. Memorandum of Decision;
9. Addenda to decision;
10. Minute order for judgment made May 2, 1929;
11. Findings of fact and conclusions of law presented upon order of May 2, 1929;
12. Exceptions to said findings;
13. Notice of motion to re-open case and affidavit on;
14. Order re-opening case, dated June 28, 1929;
15. Minute order for judgment, dated August 21, 1929;
16. Findings of fact filed January 29th, 1930;
17. Judgment;
18. Bill of exceptions;
19. Petition for appeal;
20. Order allowing appeal;
21. Assignment of errors;
22. Stipulation regarding exhibits;
23. Order for forwarding of exhibits;
24. Bond on appeal;

25. Stipulation and order in re printing transcript;
26. Praeceptum.

Respectfully,

Louis Ferrari

J. J. Posner and

F. W. Henderson

Attorneys for plaintiff and Appellant.

Dated, March 12th, 1930.

IT IS HEREBY STIPULATED that no other papers or exhibits need be included in the transcript referred to in the foregoing praecipe other than those mentioned therein.

Hartley F. Peart

Gallaher &

Jertberg.

Attorneys for defendants and Appellees.

[Endorsed]: Filed Mar. 17, 1930. R. S. Zimmerman,
Clerk, by Edmund L. Smith, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 115 pages, numbered from 1 to 115 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; petition for removal; order for removal; answer, stipulation waiving jury; motion for judgment; memorandum of decision; addenda to memorandum; minute order; findings of fact and conclusions of law; exceptions to findings of fact and conclusions of law; notice of motion to reopen case for purpose of taking depositions; order reopening case; minute order for judgment; findings of fact and conclusions of law; judgment; bill of exceptions; petition for appeal; order allowing appeal; assignment of errors; bond on appeal; stipulation regarding appeal; order for transmission of original exhibits; stipulation and order re printing transcript and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this..... day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-fourth.

R. S. ZIMMERMAN,
Clerk of the District Court of the
United States of America, in and
for the Southern District of
California.

By

Deputy.

